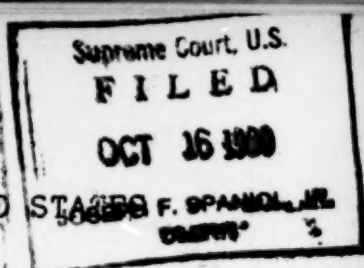


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NO. 90-651



IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

MICHAEL E. PLUNKETT, PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND  
PLANNERS; LANE + KNORR + PLUNKETT,  
INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT  
COMPANY,  
PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE  
CORPORATION, RECEIVOR OF FIRST INTERSTATE  
BANK OF ALASKA; FIRST INTERSTATE  
BANCORPORATION; FIRST INTERSTATE BANK OF  
OREGON,  
RESPONDANTS.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael E. Plunkett, Pro Se  
331 8th St  
Manhattan Beach, Cal. 90266  
(213) 379-9848

OCTOBER 16, 1990.





Rule 14.1 (a): Questions Presented  
for Review:

1. Can Appellate Court ignore questions presented for review in affirming District Court action?
2. Can District Court and Appellate Court ignore Affidavits on file , verified pleadings in granting and affirming Summary Judgment?
3. Can Appellate Court ignore Appeal of denial of Motions to Amend complaint in affirming summary Judgment?
4. Can Appellate Court (9th Circuit) continue to deprive a non prisoner, pro se litigant of equal protection by its continued failiure to provide local rules or amend local rules and/or otherwise advise pro se litigants of the substantive requirements (i.e the necessity of making a prima facie case) to avoid summary sudgment, while the 10th circuit has ruled the opposite ( that non-prisoner pro se litigants are entitled to advice of substantive requirements?

5. Can the Appellate Court Judges rule on a case despite apparant conflicts of interest and appearance of impropriety and oherwise inability to exercixe thier independant judgment in the case at bar?

6. Can the Appellate Court ignore the religious issues in affirming the lower Court?

7. Whether Court's actions and judgment constitute denial of equal protection and due process toward plaintiff.

8. Whether the Court of Appeals sanctioning District Court's granting of summary judgment on Federal antitrust and RICO claims so far departed from accepted and usual course of judicial proceedings as to call for this court's power of supervision?

9. Whether, in light of the nationwide banking and savings and loan crisis, various District and Appellate Courts have decided important questions of

Antitrust, RICO, equal protection and due process questions which should be settled by the Supreme Court ?

10. Whether Appellate Court so departed from accepted and usual course of judicial proceedings in affirming lower court's granting of summary judgment on pendant and ancillary claims as to call for exercise of this court's power of supervision?

11. Alternatively, if District Court's granting of summary judgment on pendnat and ancillary claims was procedurally proper, was Appellate Court's affirmation of said action a denial of due process and equal protection?

12. Whether the Appellate Court's affirmation of District Court's granting of summary judgment to Defendant Federal Deposit Insurance Corporation prior to opposition by Plaintiff was a denial of equal protection and due process and/or so far departed from the accepted and usual course of judicial proceedings as to call

for an exercise of this Court's power of supervision?

13. Whether appellate court's affirmation of Judgment, and failure to address question for review by Plaintiff of lack of notice to pro se Plaintiff of substantive evidentiary changes necessary to oppose Motions for Summary Judgment was sufficient departure from the accepted and usual course of judicial proceedings as to warrant exercise of this Court's power of supervision?

14. Alternatively, if the above actions by the District and Appellate Courts are not "so far departed from the accepted and usual course of judicial proceedings as to all for an exercise of this court's power of supervision", then are said usual and accepted course of judicial proceedings not in themselves a denial of equal protection and due process?

Rule 14.1.(b) List of Parties:

Plaintiff- Appellant: Michael Edward Plunkett, on his own behalf and on behalf of his partnership interest in Lane + Knorr + Plunkett Investment Company ("LKP Investments") (Plaintiff) and Lane + Knorr + Plunkett Architects and Planners (Plaintiff). ("LKP Architects")

Defendants/ Appellees: 1. Federal Deposit Insurance Corporation as receiver for First Interstate Bank of Alaska, ("FIBA") formerly Alaska Bank of Commerce. ("ABC")

2. First Interstate Bank of Oregon, ("FIBO") formerly First National Bank of Oregon.

3. First Interstate Bancorp, ("FIBC") parent of FIBO, franchisor of FIBA. Other known subsidiaries of FIBC are First Interstate Bank of Washington, Arizona, Montana, Alaska (new corporation), Wyoming, Idaho\_\_\_\_\_.

Unknown defendants, Does 1-100 were excluded by District Court in Second Revised Amended Complaint. CR\_\_\_\_\_.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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MICHAEL E. PLUNKETT , Petitioner

and

LANE + KNORR + PLUNKETT Architects and

Planners; LANE + KNORR + PLUNKETT,

Investment Company, a/k/a/ LKP Investment

Company

Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE

CORPORATION, Receiver of First Interstate Bank

of Alaska; FIRST INTERSTATE BANCORPORATION;

FIRST INTERSTATE BANK OF OREGON,

Respondants

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH  
CIRCUIT

The Petitioner, Michael Edward Plunkett,  
Pro Se, on his own behalf and on behalf of his  
partnership interests in Lane + Knorr + Plunkett  
Investment Company and Lane + Knorr + Plunkett

Architects and Planners respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above titled proceeding on May 16, 1990.

Rule 14.1 (d) Opinions in this Case  
Delivered by Other Courts.

1. Order (Summary Judgment Granted), Case A84-387, U.S. District Court for Alaska, filed 15 May 1989, CR 118. 8 pages.

2. Memorandum Opinion, 9th Circuit Court of Appeals, Case No. 89-35500, submitted, (oral argument unanimously cancelled by the Court), May 11, 1990), (Friday), filed May 16, 1990 (Wednesday). 5 pages.

3. Order, U.S. Court of Appeals, 9th Circuit, Case 89-35500, wherein a majority of the panel voted to deny petition for rehearing and rejecting suggestion for rehearing en banc. Filed July 18, 1990. 1 page.

Rule 14.1 (e) Grounds for Invocation of this Court's Jurisdiction:

(i) Entry of Judgment: May 16, 1990.

(ii) Order denying Rehearing: July 18, 1990.

(iv) Statutory provision conferring jurisdiction of this Court to review the judgment and affirmation thereto: 28 U.S.C. 1254(1).

Rule 14.1 (f). Constitutional Provisions. Statutes. involved in the case: (See Appendix for verbatim pertinent text).

1. Constitutional Provisions:

Article VI, Amendments 1, 7, 11, 14.

2. Statutory Provisions.

a. 15 U.S.C. 1 et seq. Sherman Act

b. 15 U.S.C. 13 et seq. Clayton Act

c. 18 U.S.C. 1962 et seq. RICO

d. 28 U.S.C. 455 et seq.

Disqualification of justice, judge etc.

3. Federal Rules of Civil Procedure ("FRCP"), 15, 41, 50, 56

4. Local Rules, U.S. District Court for Alaska, Rule 5, Motions & other Matters.

5. Alaska Statutes:

45.50.471 et seq. Consumer Protection

45.50.531

45.50.571 Restraint of Trade

11.41.530 Extortion

11.41.520 Coercion

6. Alaska Rules of Civil Procedure  
("ARCP") 56 (Summary Judgment)

Rule 14.1 (g) Concise Statement of  
the Case:

Nature of the Case

These are Sherman Antitrust, Clayton, RICO and State tort, contract and statutory (restraint of trade, consumer protection, usury) violation claims against a bank holding company, First Interstate Bankcorporation, ("FIBC"), its wholly owned subsidiary First Interstate Bank of Oregon (formerly First National Bank of Oregon) ("FIBO"), and a FIBC franchisee First Interstate Bank of Alaska (formerly Alaska Bank of Commerce), ("FIBA"), now Federal Deposit Insurance Corporation ("FDIC") as Receiver.

2. Course of Proceedings

After Plaintiff read of jury verdict in Wilcox v. First Interstate Bank of

Oregon 590 F.Supp 445,447 (D. OR. 1984)  
later 815 F 2d 522 (9th Cir 1987)  
("Wilcox") in May 1984, Complaint verified  
to best of knowledge and belief (Affidavit  
of Michael E. Plunkett) hereafter "AMTP"  
9/10/84 paragraph 2. Court Record," CR",  
4(Included in Appendix hereafter "App.")  
with three exhibits was filed on September  
10, 1984, CR 1 with Motion for TRO. CR 4.  
TRO was denied for lack of irreparable  
harm and improbable success on the merits.  
CR 5. FIBA was served and answered. CR 8.  
Wilcox defendants granted Judgment N.O.V.  
Wilcox Development v. First Interstate  
Bank of Oregon. 805 F. Supp 592-597 (DC  
Or. 1985) Plaintiff in Wilcox appealed.

Plaintiff moved to amend to include  
Anchorage School District "ASD" CR 10,  
verified in affidavit of Oct. 11, 1985.  
CR @ 9-10 ( App.) . Court denied Motion  
to Amend to include ASD and denied TRO on  
grounds one Plaintiff (LKP Investments)  
had filed Chapter 11 Bankruptcy (later

dismissed). CR 13 ( App.).

This Court ruled on Wilcox, in 1987, which parties in this case were awaiting to determine direction to proceed. Wilcox paved way to move to certify class action Plaintiffs and to plead RICO by amendment. (Oregon District Court had denied class certification Wilcox Development Company v. First Interstate Bank of Oregon, N.A. 97 F.R.D.440 (D. Ore. 1983).

Finally leave to file Second Revised Amended Complaint was granted Nov. 1987. CR 78 (App.) However, said amendment was not allowed to contain religious issues, class action Plaintiffs, or unknown defendants. CR 64, 78 ( App.)

In December 1987 FIBA was declared insolvent and FDIC was appointed receiver. CR 84. 6 month stay granted FDIC CR 92.

FIBO, FIBC answered Second Revised Amended Complaint CR 81 and filed Motion for Summary Judgment and Motion for Judgment on the Pleadings in March, 1988. CR 85-88. Plaintiff responded 25 April



1988 CR 95-100 with Affidavit CR 96 (App) and referencing all other Affidavits on file CR 96, pg. 3 para 11. Plaintiff moved to strike FIBO and FIBC Affidavits and for continuance CR 98. Both were denied, CR 106. FIBO and FIBC replied, CR 101-105.

Plaintiff filed Homan Affidavit in September 1988 CR 110 (App). Status conference held September 1988, dates assigned for completion of discovery for Summary Judgment Motion and rebriefing schedule, Order Sept 22, 1988 CR 111 (App)

FIBA answered CR 107, filed Motion for Summary Judgment and alternatively for Abstention order on November 3, 1988 CR 113, 114. Plaintiff had until December 7, 1988 to respond to Motion for Summary Judgment. CR 115.

Plaintiffs propounded timely first discovery requests on FDIC. Transcript ("TR") at 15. FDIC responded to First Discovery Requests received 8 December 1988. Said responses were insufficient, Tr



at. 15, 16, 18, 19 refusing to answer interrogatories or to undertake any investigation sufficient to allow it to answer said Interrogatories, denying Requests for Admissions on lack of knowledge and refusing to produce Documents other than some Documents relative to the loans in question which it did not provide until December 22, 1988. TR at 16. FDIC never produced the 1982 Second Deed of Trust note which it assured both the Court and Plaintiffs it would do.

Plaintiff awaited receipt of produced Documents to Oppose Summary Judgment Motion and Move to Compel Responses to Admissions, more sufficient Answers to Interrogatories, and to compel production of Documents. TR at 19. Prior to even commencing preparation of such a motion, or obtaining another stipulation for extension of time to Oppose Motion for Summary Judgment, Court Granted FIBA Summary Judgment on 27 December 1988, the second working day after receipt of FIBA

Documents. CR 113 (App.).

Summary Judgment hearing for FIBO and FIBC held April 28 1989, TR at 1 where Plaintiff argued importance of Homan Affidavit, TR at 15 -24, existence of genuine issues of material fact for trial, dilatory tactics of FIBA in refusing to respond to discovery, ( TR at 15-18, 18, 19), and fraud upon court of FDIC counsel Gorski falsely advising court Plaintiff had filed a claim with FDIC, (TR at 16).

### 3. Disposition in Court Below

Summary Judgment on all claims against FIBO and FIBC granted May 15, 1989. CR 118 ( App). Final Judgment was granted May 18, 1989. CR 119 (App). Motion to Amend Judgment to include FIBA filed May 26, 1989. CR 120. Amended final Judgment granting summary judgment to FIBA on Federal claims only (all that they moved for) and apparantly dismissal without prejudice of action against FIBA on pendant claims granted on June 12,

1989. CR 121 ( App). Judgment dismissed all claims against FIBO and FIBC.

b. Proceedings at Appellate Level.

Appeal was timely filed on July 13, 1989. CR 122 (C.A.9 App).

Following the San Francisco earthquake and a ten day telephone extension, Appellant brief was timely filed on 9 November 1990. In December 1990, 9th Circuit granted Appellant a 30 day time extension to file Appellant Brief based on a Motion by Appellees, giving Appellees a 60 day time extension. As a result FIBO withdrew its Motion for Extension of time. This represents one specific example of the judicial slight of hand prevalent in this case.

Appellees briefs elected to restate the "Issues Presented for Review" section deleting Appellant questions for review damaging to their position. FIBO deleted all referernces to Denial of Motions to Amend, RICO claims, Defamation claims, State Antitrust Claims, timliness of

Court's granting of Summary Judgment as to FDIC, denial of due process and/or equal protection, failure to advise pro se litigant of changes in requirements for opposing summary judgment motions, etc.

Reply brief was timely filed pointing out these deletions. Oral argument was scheduled, then cancelled at the last minute. Appellant prepared and filed a Supplemental Addendum to Appellant Brief and Reply Brief. Citation to Supplemental Authorities to Appellant Brief and Reply Brief. Errata to Appellant Brief. Errata to Reply Brief on May 10, 1990 listing over 32 additional authorities dealing with Issues presented for review, particularly RICO, interest rate overcharge cases, and other authority originally planned to be presented at oral argument in Seattle.

On Friday afternoon, May 11, 1990 the case was submitted to Judges Ferguson, Pragerson and Farris in Seattle. Less than

three working days later the Memorandum Opinion affirming the District Court had been drafted, typed, proofed, copied, filed in San Francisco, and mailed on May 16, 1990, well before the Supplemental Authorities filed by mail by Appellant could have been transmitted to, much less read by, the panel members. Not surprisingly, said Memorandum only dealt with some of the issues outlined in FIBO, FIBC Appellees Brief, ignoring the host of Questions Presented for Review, and argued, by Appellant.

Petition for Rehearing was timely filed when due, May 30, 1990 (Appellants birthdate). Financial disclosure reports were requested for judges on panel soon after Memorandum was issued, and a review of the American Bench, 1988-1989 revealed Ferguson to be Catholic, Farris to state himself a Protestant and a former founding Director of two banks, and Pragerson Director of a Jewish Organization. Not until July 10, 1990, just before the July

18,1990 Order denying Petition for Rehearing was filed were disclosure Reports mailed. Said Reports revealed Farris as owner of stock in 5 banks, Pragerson as stockholder in 2 banks including Bankamerica, alleged coconspirator with First Interstate Bank of Oregon in Wilcox v. First National Bank of Oregon, 815 F.2d 522,524 (9th Cir. 1987). Stock "purchased" in 5/7/11, 1989.

Despite the appearance of impropriety of any of the three judges sitting on the panel, no one recused himself. 28. U.S.C. 455(a),(b)(1),(4),(d)(4). In lieu of addressing the procedural railroading, short shifts, finesses, apparant improprieties of the District Court, the Appellant Court merely resorted to more of the same. That is, business as usual.

#### 4. Statement of Facts Relevent to the Issues Presented

Said claims arise from two construction loans CR 1, Ex. 2 page 1 et



seq. to Plaintiff Lane + Knorr + Plunkett Investment Company owned by Plaintiffs Plunkett and Knorr, subsequent calling of one said loan, later boycotting of Plaintiffs by other Alaska banks, and other torts, breach of contract, and wrongful acts by Defendants, their officers, stockholders and agents. Said construction loans interest rates were pegged to the Prime rate of the First National Bank of Oregon, and unlike the notes in Wilcox v. First Interstate Bank of Oregon N.A. 815 F.2d 522 (9th Cir. 1987), hereafter "Wilcox" were defined on the face of the note as the "rate charged by First National Bank of Oregon to its most credit worthy borrowers during the term of the note." CR 1, exh 2 page 1, (App), CR 110 Ex. 1, 2 ( App).

The first Construction loan was executed in January 1981, and second in February 1982. The second loan was paid off in 1983, the first note balance was declared in default with back interest of

only about \$10,000 due in December, 1983, full payment accelerated at that time (\$235,000) and property foreclosed and sold in September, 1984. CR 4 .

It is undisputed during this period FIBA "corresponded" (advanced funds by FIBO to FIBA) with FIBO. It is disputed that FIBO participated in loans with FIBA. CR 110 page 3 ( App). Plaintiff's Affidavits provide admissable evidence that FIBA and FIBO did participate in loans where the prime rate was defined as the rate charged by FIBO to its most credit worthy borrowers. CR 110 (App) It is not disputed FIBO made sub prime loans. CR 96 paragraph 16, 17 ( App).

On May 17, 1982 Plaintiff agent learned that FIBA officer had defamed Plaintiff Lane + Knorr + Plunkett Architects and Planners by stating to a Rogers and Babler officer that LKP Architects was almost bankrupt. CR 96, para. 13 (App). Said statement was



made in the context of a veiled bribe offer to LKP agent Ben Garland. CR 80, page 23.

In January, 1984 FIBA called an accounts receivable loan to LKP Architects, and illegally removed funds from Michael Plunkett Inc. account, CR 1,80 page 12 (not a guarantor of said loan). It further called a furniture loan despite the fact said loan was virtually current (said loan was later reinstated), and in the process falsified the notary on a UCC guarantee, CR 96, para 15 ( App) which assigned to FIBA security for real estate loans .

In February 1983 Marge Redbird, bookkeeper for LKP telephoned FIBO twice to ascertain FIBO prime rate for each month of the construction loan. CR 96, para 4 (App) Exhibit 4, to CR 80 .

Each month, through default in December 1983, FIBA would mail loan statements to LKP on which the loan rate was typed on the face of the statement. CR

96, para 4 (App) Exhibit 5 to CR 80 .

The Deed of Trust Note which defined the Prime Rate was standard FIBA ,CR 110, page 1-4 ( App) prepared for many loans so that participation with FIBO could be effectuated on a loan by loan basis. CR 110, page 1-4 ( App).

Despite the fact FIBA officers knew Wilcox had been filed, CR 110, page 3-4 ( App) no attempt to renegotiate the Deed of Trust Note terms, or rebate interest overcharges as a result of sub prime rate loans was ever effectuated with plaintiffs. TR p.23. FIBA counsel Kurtz claimed some 15 borrowers had brought the Wilcox case to his attention, CR 37 page 4, (App), all of whom were denied any relief. Revised Second Amended Complaint, CR 80 para. 10.

Alaska Bank of Commerce became a franchisee to FIBC in 1983. FIBC sent employees to Alaska to supervise FIBA branch bank design plans. CR 96,para 18.

Robert McWhorter became FIBA commercial loan officer in 1983. Commercial Loan Officer Kauffman proposed a SBA loan strategy in early 1983 whereby a revolving line of credit would replace an accounts receivable loan to LKP Architects. After LKP was terminated by the Anchorage School District on March 31, 1983, at the suggestion of agent for Rogers and Babler. At the time Don Mellish, Chairman of the Board of National Bank of Alaska was a director of Rogers and Babler's parent MAPCO Inc. McWhorter met with Plunkett and categorically denied any further loans to Plaintiff, contrary to Kauffman's earlier proposals. CR 96 para 9, ( App).

McWhorter had been fired from FIBO in 1982. CR 101, CR 102. Plaintiff included fact that McWhorter was a plant, looking out for the interests of FIBO. CR 96, para 9 ( App) page 3, prior to Reply by FIBO.

Kauffman defamed LKP Architects by relating to former LKP employee that LKP was insolvent and about to close its

doors. Complaint CR 1 page 10, verified by CR 4 para 2. CR 80, para 22, 32, 69.

Prior to foreclosure sale of September, 1984 Plaintiff approached every bank in Anchorage in an attempt to refinance two unsold condominium units which secured January 1981 Deed of Trust Note, CR 96 para 13 ( App). Each bank denied credit, some stringing Plaintiffs along, one stating categorically that so long as the lawsuit against LKP existed by Anchorage School District (filed in June 1983) no loan was possible, CR 96 para 13 (App). Virtually all said banks which expressed interest in loans and who had requested financial statements etc. had communicated with FIBA prior to denial of credit. CR 96, para 13 ( App). Revised Second Amended Complaint, CR 80 pages 11-12, 24.

One National Bank of Alaska loan officer, Seiberts, Roman Catholic, signalled loan officer Struts, by

implication Catholic, when I asked Seibert for loan, and he routed me to Struts, who then denied loan, stating lawsuit with Anchorage School District and Rogers and Babler as reason. CR 96 para 13 (App).

Rule 14.1 (i) Basis for Federal Jurisdiction in the First Instance:

28 U.S.C. 1331, (Federal Question; 28 U.S.C. 1332 (Diversity Action); 28 U.S.C. 1337 (Antitrust controversy jurisdiction); 15 U.S.C. 1 et seq. (Antitrust Action), 18 U.S.C. 1961- 1968 et seq. (RICO), 28 U.S.C. 1292 et seq., 28 U.S.C. 2201-2202, Declaratory Judgments and other remedies; 28 U.S.C. 1441 (c), Actions Removable; pendant and ancillary jurisdiction: See United Mineworkers v. Gibbs, 383 U.S. 715, 16 L.Ed 2d 218, 229, 86 S. Ct. 1130 .

Rule 14.1 (j) Argument (Reasons)

The constitutional equal protection and due process issues raised in this case hinge on the Court's treatment of non prisoner pro se litigants and/or non Christian, non-clerically controlled

litigants,. As a result of the Anderson v. Liberty Lobby Inc. ("Anderson") 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed 2d 202 (1986), Celotex Corp. v. Catrett ("Celotex"), 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed 2d 265 (1986) and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., ("Matsushita") 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed 2d 538 (1986) decisions of this court, the 9th Circuit ruled in California Architectural Products Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) case that "no longer can it be argued that any disagreement about a material issue of fact precludes summary judgment". Although Plaintiff claims a prima facie case was made sufficient to preclude summary judgment on all claims, the District and Appellate Court decided otherwise based almost exclusively on the Celotex and California decisions allowing summary judgment where "a complete failure of



proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." Celotex, 477 U.S. 324, 91 U.S. 324, 91 L.Ed 2d 274.

As the instant case had been filed before Anderson, Celotex or California, pro se litigant deserved at least notice of the policy change in requirements necessary to resist summary judgment, particularly as to summary judgment as to pendant and ancillary claims since Alaska rejected the prima facie case requirement of Celotex in Moffatt v Brown, 751 P.2d 939 (Ak. 1988).

This issue has enormous significance on national fronts. Entire non prisoner pro per population is being effected in different ways by at least three circuits and various States by being denied amendments to Rules to identify the effects of Celotex etc. Thousands of defrauded borrowers are being denied restitution by First Interstate group of bank, and banks throughout the United



States by Courts' consistent and repeated refusal to entertain RICO, class action, Antitrust and/or pendant jurisdiction claims.

1. CONFLICT BETWEEN COURTS OF APPEALS: Can the 9th and 6th Circuits continue to hold non prisoner pro se litigant is not entitled to detailed requirements (i.e necessity of making a prima facie case to avoid summary judgment) while 10th circuit holds the opposite?

A. Issue

Despite including this issue in "Questions for Review" in Appellant Brief, and in Petition for Rehearing and Suggestion for Rehearing En Banc, Court of Appeals failed to address this conflict between its decision in Jacobson v. Filler, 790 F.2d 1362, 1363-1367 (9th Cir. 1986) and Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985). Brock v. Hendershott, 849 F.2d 339, 343, (6th Cir.

1988) and Bauman v. State Div. of Family and Youth Services, 768 P.2d 1097, 1099 having adopted Jacobson, despite Judge Rabinowitz's strong dissent in Bauman, 768 P.2d at 1102 citing An extension of the Right of Access: the Pro Se Litigant's Right to Notification of the Requirements of Summary Judgment Rule, 55 Fordham L. rev. 1109 (1987) by Joseph M. McLaughlin.

In the former case, the 9th Circuit held summary judgment was appropriate because the non-prisoner pro se litigant, by existence of local Arizona District Court Rules requiring a tabular list of facts in support of summary judgment, had been apprised of substantive evidentiary requirements not included in Fed Rule Civ. Procedure 56 (e). It further held that the Court was under no obligation to advise a pro se litigant any more than a practicing attorney and to advise a non prisoner pro se litigant of any substantive requirements should be accomplished by formal rule amendment rather than

peicemeal adjudication. 790 F.2d at 1368.

Quite the contrary however is Circle K, where the court held that non prisoner pro se litigants were entitled to ". . . proper notice regarding the complex procedural issues involved in summary judgment proceedings, citing an earlier 9th Circuit Case Garaux v. Pulley, 739 F.2d 437,439 (9th Cir. 1984). Even the 9th Circuit has admitted that "This Court has consistently held that courts should liberally construe the pleadings and efforts of pro se litigants, particularly where highly technical requirements are involved." U.S. v. Ten Thousand Dollars in U.S. Currency, (emphasis added), 860 F.2d 1511,1513 (9th Cir. 1988). also citing Garaux at 439.

B. Argument This conflict issue is the crux of Plaintiff's case. Had plaintiff been advised of the new (since time of filing case in September, 1984) substantive requirements of California

Architectural Building Products Inc.  
v. Franciscan Ceramics Inc. 818 F.2d  
1466,1468 (9th Cir. 1987) requiring a  
prima facie case, the District Court would  
have denied summary judgment, or the  
Appellate Court would have no grounds on  
which to state "he (Appellant) does not  
begin to approach the level of proof of  
unlawful concerted activity required for  
his antitrust claim, as the district court  
noted." and the "factual paucity of  
appellant's case". 9th Cir. Memorandum  
("Memo") at 5.(App). In Circle K the 10th  
Circuit ruled the District Court abused  
its discretion in failing to advise  
Plaintiff of requirements and allowing a  
continuance to meet those requirements,  
including an opportunity to verify his  
complaint (an action already accomplished  
by Plaintiffs in the instant case.

Thus, this issue met the 9th circuit  
criteria for Rehearing en banc of an  
opinion of another circuit court of  
appeals directly in conflict which

substantially affects a rule of national application and an overriding need of national uniformity. (9th Cir. Rule 35-1). Further, since Circle K relied on prisoner pro se cases, Garaux v. Pulley, Barker v. Norman, 651 F.2d 1107, 1128-1129 (5th Cir. 1981), Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982), Roseburo v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975, and Hudson v. Hardy, 412 F.2d 1091, 1094-1095 (D.C. Cir. 1986), what must be reviewed by this Court in the first instance is whether the 9th circuit erred in assuming a non prisoner pro se litigant is to be treated any different than a prisoner pro se litigant ( since this court has firmly held in Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct 594, 595, 30 L.Ed 2d 652 (1976), Estelle v. Gamble , 429 U.S. 97, (1976), Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66 L.Ed 2d 163 (1980), Boag v. MacDougall, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed2d 551

(1982) that pleadings of pro se litigants are to be held to a lower standard than those of a practicing lawyer, without regard to whether said pro se litigant was a prisoner.)

This conflict clearly needs settling by this court, what with the enormous increase in litigation costs (even without attorneys), enormous attorney fees, and increased complexity of the Rules and cases interpreting them.

Treating pro se litigants in different parts of the country is an "intolerable conflict" (A practical Guide to Certiorari, S. Baker, 33 Cath. U. L.Rev. 611-619 (1984)) flying in the face of due process and "equal" protection clauses of the 14th Amendment. Such a conflict is both real in the application of law, and a conflict in the underlying principles, both which require resolution here. Such square and irreconcilable conflicts have been granted certiorari in McElroy v. United States, 455 U.S. 642, 643



(1982), Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 388, 373 (1981). The issue in conflict is important and recurring and a uniform rule on the point is needed. Commissioner v. Bilderp, 369 U.S. 499, 501 (1962). Even if the conflict were to be only apparant, this court has granted certiorari in Barrett v. United States, 423 U.S. 212, 215 (1976) and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 669, n. 6 (1977).

As the issue is one divided among circuits and not heretofore decided, it meets the criteria for certiorari of Lehman v. Lycoming County Children's Services, 458 U.S. 502, 507 (1982). As the conflict is extremely relevent to the resolution of the case it meets the test for certiorari of Sommerville v. United States, 376 U.S. 909 (1964).

2. Can Appellate Court Ignore Questions Presented for Review in Affirming District Court Action?



### A. Issues

The following questions presented for review at the Appellate level were ignored in the Affirmation.

1. "Whether the Court errored in denying Motions for Leave to Amend Complaint to reinclude class allegations, to included religious issues, and to reinclude unknown defendants, and to include conspiracy in restraint of trade (boycott) issues adding Anchorage School District as other defendants."

"3. Whether the entire process before the court constitutes denial of due process and/or equal protection to a proper or other litigant, and/or bias by the court."

"4. Whether the Court errored in granting summary judgment to defendants on RICO claims." (Appellate Court and District Court falsely concluded that all Plaintiffs' claims were based on the allegations of a conspiracy).

5. Whether Court in fact granted

summary judgment to FDIC on the merits in the pendant and ancillary claims. The trial record clearly indicates, as does FRCP 41(b) that dismissals on jurisdictional grounds (such as pendant claims) are without prejudice. What the District Court failed to clarify in the Judgment, and what the Appellate Court was asked to clarify in the Appeal (due to the Alaska Superior Court's granting of summary judgment on claims it held were the same on res judicata grounds), that in fact these pendant claims were dismissed as to all Defendants without prejudice.

7. Whether the Court acted unreasonably in granting summary judgment to FDIC prior to opposition by Plaintiff?

8. Whether the court erred in failing to give notice to Pro Per Plaintiff of substantive evidentiary changes required in opposing Motions for Summary Judgment.

Clearly equal protection and due

process were denied by Court's failure to address these issues, even with one sentence to the effect the above questions were frivolous (which obviously they were not). Obviously the Memorandum by Appellate Court merely parroted the Appellee Brief (or was surreptitiously drafted by Appellee at request of Court, a common practice in Alaska, and perhaps everywhere).

#### Reasons for Granting Review

Even if grounds existed to uphold the District Court on a factual basis, which is vigorously denied, the above points on appeal deserved review on a procedural basis. To deny said review, no matter how brief, was to deny due process and equal protection. . The hasty and erroneous Memorandum is clear proof of the Appellate Court disinterest in the case and/or inattention to its newly Statutorily mandated charge as the Court of last resort as a matter of right. 28 U.S.C. 1254(1). What could be "bumped

upstairs" as a matter of right by an appellant in a Federal case is no longer possible. The discretionary review now limiting Appellate Court decisions by this Court completely changes the obligations of the Appellate Courts, an obligation obviously shirked in the instant Appeal. Such irresponsibility clearly calls for the supervision of this Court, as such blatant irresponsibility is, or should be so far outside the usual course of proceedings as to warrant review.

The importance of the issue is that it effects the attitude of all the Circuit Courts now that Appeal as a matter of right has been denied in a civil case. Its importance as a matter of first impression resolvable by this Court only of the Circuit Court's interpretation and application of due process is enormous as is the import of a District Court's ability to dismiss a pendant and ancillary claim with prejudice.

3. Can the Appellate Court Ignore Appeal of Denial of Motions to Amend Complaint in Affirming Summary Judgment?

Assuming, arguendo, that the Appellate Court was not denying procedural due process in failing to even address this issue, the question remains whether Affirming the District Court's various denials of Motions to Amend was so improper as to warrant this Court's review on the merits. Central to this question is the Appellate Court's false statement that "all of his claims, both state and federal, are based on an allegation of conspiracy" (Memo, page 4.) (App). Not so. Petition for Rehearing (App). Page 2 CR 1, CR 80. Even assuming all claims were in fact based on the claims of a conspiracy, plaintiff's denial of such an outrageous claim should in itself have been grounds for leave to amend to allow pro se Plaintiff an opportunity to replead to alleviate any construction of the complaint which hinged all other claims on

a conspiracy. This was not done.

B. Resons for Granting Certiorari

Appellate Court's affirmation so far steps outside the usual course of conduct of proceedings as to demand its review and supervision. Basically, leave to amend must be freely granted. Pleadings may be struck only when frivolous etc. Denial of Motions to Amend can only be made where prejudice will accrue to opposing party, such as closeness to trial etc. Motion for leave to amend to bring in Anchorage School District as coconspirator and separately (pendant claims) was filed in 1985. Motions to amend to include religious issues, denial of first amendment rights was properly plead, was not prejudicial, but was denied on grounds of relevance and lack of "showing to the contrary" CR 78 page 2.(App).(Court claimed it had "heretofore ruled" irrelevance, but no such order exists. See CR64. Proof is for discovery, not



pleading. The Catholic Court was clearly well out of bounds for denying said claims on evidentiary and relevance grounds.

As to the class claims, the Court again finessed Plaintiff by denying class allegations in the motion to amend, even though they existed in the original complaint. No Court order existed which set a date to Move to Certify the Class Action, so leave to amend was grossly denied by striking class allegations, in effect a denial of class action certification without briefing.

Similarly with unknown defendants, it was improper to strike this claim. Defendants can be added after trial, when for instance defendants identities become known at, or after trial. With religious issues particularly, various third orders and other groups responsible for the various aspects of the rate fixing intrigue could be discovered at any time. A new trial or separated trial might be mandated, but not to arbitrarily strike



the properly formed pleading.

Taken together the above actions clearly demonstrate extreme prejudice against Plaintiff either because he is not a bank, is not an attorney, or is not a member of a Judeo Christian religious society and therefore is not subject to the control of some other entity. Regardless, supervision by this Court and granting of Certiorari is obviously mandated by such flagrant injustices.

Said actions constitute a conflict with this Court's many interpretations of the FRCP and therefore precedence set against a pro se litigant by the cavalier action of the prejudiced court is enormous and must be checked by this court's supervisory role.

4. Can District Court and Appellate Court Ignore Verified Pleadings and Affidavits on File in Granting Summary Judgment?

Again assuming, arguendo, that

Appellate Court was procedurally proper in not addressing the issues of verified pleadings and other Affidavits on file, the issue remains as to whether the Appellate Court and District Court erred substantively in ignoring said documents. The validity of verified complaints to resist summary judgment is well settled in Appellate Courts. Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10 Cir. 1985).

This Court has not addressed the issue, nor has it addressed the issue of an Appellate Court's refusal to review the entire file which included such documents as well as other Affidavits.

Once Plaintiff was denied a trial through summary judgment, Appeal on the merits, given the Court's insistence a pro se plaintiff must meet the California criteria despite no warning of the need to do so since California was decided well after this case was filed. The Court had an obligation to review the entire file pursuant to Rule 56. It did not do so.

The Appellate Court, reviewing De Novo also had an obligation to do so. It did not do so. This is reversible error an egregious departure from the usual proceeding as to warrant Court review.

the importance of this issue to pro se litigants of all types is immense, who lack the resources to retain counsel to research summary judgment, but have the ability to verify a complaint. To allow a Circuit Court to sanctify ignoring of the entire record is denial of due process and flagrant violation of the many decisions of this Court regarding application of summary judgment rules.

5. Did the Court Error in Granting Summary Judgment to FDIC ?

Assuming Court was procedurally proper in failing to address this issue on Appeal (which is vigorously denied), the issue of the proper procedure by District Court warrants review and supervision as does Appellate Court's sanction of such

actions. Even without an Opposition, Court was obligated to review the entire file before granting summary judgment, particularly with respect to a pro se litigant. This it did not do. It also should have waited until the hearing before granting summary judgment. It granted summary judgment merely because Plaintiff did not oppose the Motion with a separate memorandum, even though the Opposition to the Motion by FIBC/FIBO was fully briefed at that time, and included case law and argument as applicable to FIBA as other defendants. Affidavits and verified complaints were on file. FDIC had refused to properly respond to discovery etc. In short the granting of summary judgment over the Holidays in 1988 was a railroading operation, a travesty of due process and equal protection demanding this Court's review and supervision, particularly in view of the several months the Court would take to make a decision after previous motions were fully ripe.

6. Can Appellate Court Judges  
Memorandum Go Unreviewed Despite  
Appearance of Impropriety and Otherwise  
Inability to Exercise Independent  
Judgment?

As described above, the Appellate panel consisted of two judges with substantial bank stock interest and holdings. The third judge is admitted Roman Catholic with so few listed assets as (not even a personal residence) as to very likely be a mendicant or monastic lay brother, cleric, tertiary or some other special relationship with Christianity that requires vows or solemn promises of poverty and/or obedience. Despite the one and despite the six different bank stock holdings, and former board member of two banks of the third judge (said stocks are valued at between \$47,000 and \$160,000), no judge attempted to recuse himself.

Next, the hastily prepared, factually inaccurate, Memorandum, the circumstances

surrounding the extension of time to file the Appellee's brief, and the cancellation of the Oral Argument after same had been set, etc, intentional delay in forwarding the Disclosure Statements, all point to bias, impropriety, and fundamental denial of due process and equal protection sufficient to warrant this Court's supervision. It also brings up the possibility the panel was not randomly selected per 9th Cir. Note to Rule 34-1 to 31-4. Regardless of whether the bias is because of the bank holdings of judges, and/or clericalism of one or all of the judges does not matter. The impropriety on its face is sufficient to warrant review.

The importance to all pro se litigants is obvious. They are treated as second class advocates by judiciary and clerks. If this case is allowed to stand, the judicial basis for expanding this treatment to other Courts and cases, and issues will continue. For instance, as a



sequel to Jacobson, the 9th Circuit held that requiring a pro se litigant to presubmit all examination of witnesses in advance of trial to opposing counsel was not a deprivation of due process! Miller v. Los Angeles County Board of Education, 799 F.2d 486, 489 (9th Cir. 1986). This prejudicial treatment of pro se litigants must be checked. Said treatment is in direct violation of this Court's rulings that pro se litigants efforts and pleadings are to be held to a lesser standard. In fact pro se litigants are being held to a much higher standard.

6. Can the Court Ignore Religious Issues in Affirming Lower Court.

As discussed above, the lower Court denied leave to Amend as to religious issues mistakenly claiming the issues had been ruled irrelevant and claiming no proof had been offered. That a Roman Catholic Judge would protect another Roman Catholic, or more pointedly, the Roman



Cathollic Church itself, from the embarrassment of a lawsuit in which clericalism is a named issue (even though the church and the Roman Catholic bank owner Albert Swalling were not named Defendants) is evidence in itself of judicial impropriety in favor of the church, calling for this Court's supervision. Said radical denial of due process is further proof that in fact the banks' rate fixing and discounting program was clerically inspired.

The importance of this First Amendment issue is enormous, as CR 52, alleges separate and collusive action to deny plaintiff's religious liberty. For the church to use the Courts to induce religious conversion through harassment, financial burden, etc. is an enormous abuse of process. The far reaching effects of allowing a District Court to arbitrarily strike or deny amendments based on relevance, as opposed to relating back, or other standards calls for Court

Supervision. Said act so conflicts with Kinnear Weed Corp v. Humble Oil & Ref. Co., 214 F.2d 891 (C.A. 5th 1954, cert den. 384 U.S. 912, 75 S.Ct. 292, 99L.Ed 715 (1955) (Pleadings or portions thereof cannot be struck where their presence in the pleading cannot prejudice the adverse party.) as to demand review.

7. Whether the Appellate Court's Sanctioning of the District Court's Granting of Summary Judgment on Antitrust and RICO Claims So Far Departed from Accepted and Usual Proceedings as to Call for this Court's Power of Supervision?

Assuming, but not conceding, that the Federal Rules and the Court were sufficient procedural and/or substantive notice of the changed requirement that to resist summary judgment evidence supporting every essential element of a claim must be proffered, the Federal claims were substantiated by the record sufficient to resist summary judgment on

the merits..

A. Antitrust Claims.

Despite having demonstrated that a prima facie case or a genuine issue of material fact as to each of the essential elements of both the per se and rule of reason standards had been made, the Appellate Court ignored these facts, basing its Opinion on the misstated argument of Appellee FIBO/FIBC, ignoring the various Affidavits on file, the statements and facts in Wilcox, and the facts stated in the verified complaint and verified proposed amended complaint. See Petition for Rehearing(App) for outline of errors.

B. RICO

The Appellate Court briefly discussed the RICO claims in its statement of the case, but completely ignored the RICO issue altogether in its discussion of substantive law and conclusions, claiming no business relationship existed between FIBC and FIBO, thereby stating a

contractual arrangement has to exist for RICO and other wrongs to be actionable (a novel decision). Plaintiff developed a business relationship with FIBO in making two telephone inquiries to FIBO. Restatement(Second) of Torts, Sec. 531-533 recognizes misrepresentations need not be made directly to an injured party. FIBC agent had business relationship with plaintiffs in design review of branch banks. Courts ignored genuine issues raised by calling FIBO, FIBC affidavits credibility into questions by these facts along with the correspondance and participation relationships denied by FIBO and FIBC.

This court has repeatedly overturned Appellate Court decisions which have arbitrarily attempted to limit RICO applications. Another question for review, not raised by any party below, but raised by the Appellate Court is whether a business relationship must exist to

trigger RICO. If so, Plaintiff was also intended third party "beneficiary" of the participation agreement between FIBO and FIBA since standard Loan Document pegging the loan rate to FIBO's prime rate was set up so a loan could be participated by FIBO. CR 110, (App).

Again, court errors in review of RICO claim are found in Petition for Rehearing. (App). See also Civil RICO and Interest Rate Regulation, by William Burke, The Business Lawyer, Vol 39, May 1984, 1252-1261, 41 Washington Financial Reporter, Dec. 19, 1983, page 933, for discussion of enormity of claims facing FIBO, FIBC in class actions.

#### C. Reasons for Granting Certiorari

The Court has granted Certiorari on factual matters where case acquires importance for some other reason. Mobil Oil Co. v. FPC, 417 U.S. 283, 292 (1974). See Stern & Gressman, Supreme Court Practice, 6th ed. 1986, Sec. 4.14, and where a small claim is sought but due

process questions are substantial. Thompson v. City of Louisville, 362 U.S. 199, 203 (1960). This Court has granted review of the application of constitutional principles to slightly different but frequently occurring factual situations. Michigan v. Long, 463 U.S. 1032 (1983).

8. Whether in Light of the National Savings and Loan and Banking Crisis , Various District Court and Appellate Courts Have Decided Important Questions of Antitrust and RICO, Equal Protection and Due Process Which, Given the Instant Case Should be Settled by this Court (Rule 10.4)?

As Stated in the Supplemental Authorities, some thirty district and Appellate Cases known to date have been reduced to Published Opinion. Only two, NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987) Appeal in forma pauperis denied, 484



U.S. 974, 98 L.ed. 2d 481, 108 S.C. 483, (1987). has reached this Court., (American National Bank and Trust Company of Chicago v. Haroco, 473 U.S. 606, 87 L.Ed 2d 437, 105 S.Ct. 3291 held mail fraud sufficient to raise RICO claim). That some of the nation's largest banks would participate in various schemes to defraud borrowers by discounting below the published prime rate, when said rate was either the established rate or actually was defined on the face of the note as the rate offered the bank's most credit worthy borrowers, and that said action has gone unpunished by the courts is appalling. Every Court has used every technicality to reduce any such claims to "breach of contract" or misrepresentation claims, thus removing them from the Federal Courts. These published opinions involve over 15 banks, 9 District Courts, and 5 Appellate Courts. Despite the fact many large settlements have been accomplished on the RICO claims alone , few claims have



been allowed to go to trial, and like Wilcox, even with a jury Verdict against FIBO, the Court overturned same and Appellate Court affirmed, but reversed the granting of summary judgment on RICO.

Given this history, it is time this Court settle the issues, and mandate the judicial proceedings for the thousands of defrauded borrowers nationwide victimized by these banks.

10. Whether the Appellate Court So Departed From Accepted and Usual Course of Judicial Proceedings in Affirming Lower Court's Granting of Summary Judgment on Pendant and Ancillary Claims As To Call for Exercise of this Court's Supervision?

Memo at 5 states District Court has every right to dismiss pendant and ancillary claims. Plaintiff/Appellate/Petitioner agrees the District Court has the right to dismiss pendant and ancillary claims for refiling in state court, not to dismiss same on the merits. Memo cited

Alaska case Shultz v. Sundberg, 759F.2d 714, 718 (9th Cir. 1985) which cited Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984). Both held pendant claims to be dismissable but were silent as to dismissal with prejudice. Fed. Rule of Civil Procedure 41 (b) clearly states that dismissals for lack of jurisdiction, or improper venue do not operate as an adjudication on the merits., (APP. FRCP 41(c). justices Farris and Ferguson both participated in Schultz.

With such a clearcut a Rule and Memo by the court Plaintiff would be first to state Appeal of this issue as frivolous. Unfortunately, however this Court's supervision is needed because the Alaska Superior Court at the extreme prompting of a Federal Agency, FDIC, has Adjudged that the dismissal of pendant and ancillary claims against the parties has been on the merits, and therefore granted summary judgment against Plaintiffs in Civil Case 3AN-87-9269 in State Court on res

judicatsa grounds. Said case therefore required yet another appeal, now pending before the Alaska Supreme Court. A motion for stay in those proceedings by Petitioner in this case pending outcome of this petition was denied. Said Appellant brief is due about November-22, 1990, well before this Petition will have been ripe, one more example of the judicial whipsawing used to deny due process, by conflicting one jurisdictional So by whipsaw, finess, deceit, overt omission, the Courts are equally able to deny protection of the laws to whomever it chooses.

Court affirmed that it had in fact dismissed pendant claims without prejudice. The next stunt was the Amended Judgment wherein FDIC counsel propose language which stated " This Court having granted motions for summary judgment in favor of the defendants.

IT IS HEREBY ORDERED AND ADJUDGED

that plaintiffs' complaint against defendants First Interstate Bank of Oregon, First Interstate Bancorp, and FDIC, receiver of First Interstate Bank of Alaska, is hereby dismissed." Compare this with the transcript at 13-14:

MR. REYNOLDS: (FDIC Counsel) Your Honor, only insofar as FDIC, as receiver for First Interstate bank, had moved for summary judgment based upon the federal law claims of the Sherman Act and the RICO claims. and I just wanted to make a statement or inquiry about those to the court.

On December 27th, the Court granted FDIC receiver's motion for summary judgment. And in regard to the federal law claims, and dismissed the case as to the state law claims. . . . So if the Court has granted our summary judgment motions, then there's not really anything for me to argue on behalf of FDIC. . . .

THE COURT: Well, I thought I had granted it, but now you're raising

questions in my mind."

So a principal issue in need of supervision in this case is whether the Court did in fact dismiss as adjudication on the merits, the pendant and ancillary claims. Since the FDIC and Alaska Court system have taken the position said claims were dismissed with prejudice, Petitioner must take the same view and demand this court supervise the lower court's obvious overstepping of their authority under United Mineworkers v. Gibbs, and reverse the Judgment as to Pendant and ancillary claims against, FDIC, FIBC, FIBO so they may be filed in state court.

11. Alternatively, If District Court's Granting of Summary Judgment on Ancillary Claims Was Procedurally Proper, Was Appellate Court's Affirmation of Said Action such a Departure from Accepted and Usual Course of Judicial Proceedings in Affirming Lower Court's to Call for Exercise of this Court's Power of

### Supervision?

As argued above, this court must supervise the lower courts on this issue. Appellee's contention that all claims hinged on establishment of a conspiracy was pure bunk. Pleadings clearly made individual claims. Affidavits, verified complaints provided admissible evidence of said separate claims. FIBO/FIBC did not even "point out" no genuine issues of material fact existed as to several of such claims, like violations of Alaska Consumer Protection Statute, AS 45.50.471 et seq., yet the Court granted summary judgment on this issue, and the Appellate Court affirmed. Similarly, a defamation claim was properly plead against FDIC. Affidavit was submitted (CR 96), (AP), offering proof of same. FDIC did not even "point out " no genuine issue existed on this issue, yet District Court granted summary judgment on this claim and Appellate court affirmed. Clearly supervision is necessary. Wide



implicatsion exists as this is the rule rather than the exception with Plaintiffs who have pressed claims against banks on these 30 or more rate discounting claims.

It is in the national interst that the District Courts pay attention to thier responsibilities and not be led down the path by unscrupulous attorneys, particularly when the adversary is appearing pro se. For the Appellate Court to concentrate on a decision for one group of parties, and "slide one by " for another is basis denial of equal protection and due process, which this court is obligated to resolve.

12. Whether the Appellate Court's Affirmation of District Court's Granting of Summary Judgment to Defendant Federal Insurance Corporation Prior to Opposition by Plaintiff Was a Denial of Equal Protection and Due Process and/or So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call



for an Exercise of this Court's Power of Supervision?

Railroading as an issue was brought up below, Appellant Brief at 45. Said conduct is therefore not unique to this case. See Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 214-217 (4th Cir. 1987) It is conduct which is a national phenomenon particularly in these interest fraud cases. Although Tiller was not a railroaded case, it certainly was swept out the back door of the 5th circuit. The instant case method of sweeping the case out the door was to whipsaw the Plaintiff by allowing the Defendant to delay production, then provide inadequate, useless production, then grant summary judgment over the Christmas Holidays , before pro se Plaintiff can move to compel, for more time or other wise oppose. Despite this, Plaintiff's opposition to FIBO/FIBC Motion for Summary Judgment, already ripe contained more than sufficient Opposition,

evidence, argument to preclude summary judgment against FDIC, yet the Court did not even look at said evidence, or the verified complaint, or verified amended complain or affidavits.

13. Whether Appellate Court's Affirmation of Judgment, and Failure to Address Questions for Review by Plaintiff of Lack of Notice to Pro Se Plaintiff of Substantive Evidentiary Changes Necessary to Oppose Motions for Summary Judgment Was Sufficient Departure from the Accepted and Usual Course of Judicial Proceedings as to warrant Exercise of this Court's Power of Supervision?

This question is the heart of this Petition. By failing to even address many issues, and failing to rule on whether sufficient evidence existed to raise a genuine issue for trial on the RICO claims, the Appellate Court has grossly abused its jurisdictional powers, all to the benefit of the Defendants.

Assuming, but not conceding, the trial and Appellate Courts were correct that insufficient evidence was proffered to resist summary judgment on Federal and/or state Claims, the reason for this was the change in midcase as a result of the Celotex, Anderson and Matsushida cases as interpreted by the 9th Circuit in California. By requiring a prima facie standard in lieu of a genuine issue standard without notifying pro se plaintiff of this changed requirement left plaintiff believing his Affidavits and exhibits thereto and Affidavit of Homan were sufficient to raise a genuine issue of material fact for trial on each of the claims for which FIBO/FIBC and FDIC sought summary judgment.

It is no wonder plaintiff was quite surprised when the Court, having allowed additional discovery time for the express purpose of resisting summary judgment but not saying such discovery was required, or why additional evidence was necessary,

granted summary judgment to FDIC prior to filing opposition or results of discovery (nothing of substance), and having a hearing and still not advising of the lack of evidence as to FIBO/FIBC and then for the first time while granting summary judgment to FIBO/FIBC announcing Plaintiff had failed to meet the evidentiary standard established by California, a case decided 3 years after the instant case was filed!

At the Appellate level a District Court case was submitted to demonstrate a Court who gave a licensed attorney an opportunity to rebrief opposition to summary judgment to demonstrate an element of fairness in treating cases in the pipe. Smart v. Mid-Continent Imports, Inc., No. 85-2273 (D.C. Kan. 1986).

On Appeal, Plaintiff argued the verified complaint and proposed amended complaint provided additional evidence to resist summary judgment. This evidence was

ignored by the Trial and Appellate Court.

Had plaintiff known at the conference in September that a prima facie case per Rule 50 would have to be made some, additional discovery could have been made (Plaintiff had to seek employment and relocate to California during this period) and Motions to Compel Discovery issued to provide evidence to support or raise a genuine issue for trial on every element of every cause of action against every party. A pro se litigant cannot be expected to read every relevant Supreme or Appellate Court case as it comes out.

This issue is of nationwide import as it affects all non-prisoner pro se litigants, a group not expressly addressed by this Court. Even the Supreme Court Rules give extreme latitude to prisoner or in forma pauperis pro se litigants, but to the pro se litigant who makes one dollar a year over the indigency limit, staggering requirements suddenly take over. The special printing requirements for the

appendix are an example. To meet the format, virtually all Appellate Appendix items have to be reformatted which requires retyping of all typed documents, different binding requirements etc.

Not only is Jacobsen inconsistent with Jaxon v. Circle K but is inconsistent with another 9th Circuit Opinion in Wilborn v. Escalderon, 789 F.2d 1323, 1332, (9th Cir. 1986) wherein the same Court stated it was permissible to advise a non prisoner pro se litigant of the need to amend to add an indispensable party! Conflicts within a circuit are grounds to grant certiorari when conflicts between circuits on the issue also exist, particularly since Suggestion for Rehearing en banc was denied. Scarborough v. United States, 431 U.S. 563, 567n.4(1977). Intracircuit conflict and importance of the question are also grounds for certiorari. John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939).



What must also be settled by this Court on a more general level is whether California is a proper interpretation of Celotex, Anderson and Matsushida, since California stated the decisions were a change ("no longer can",) as opposed to an interpretation of existing law.

The next important question to be determined is whether( assuming arguendo California is a proper expansion of Celotex et al ) rule 56 as written is sufficient notice to a non prisoner pro se litigant of the substantive prima facie case requirements needed to resist summary judgment. It is Petitioner's position that no reasonable person can interpret Rule 56 as requiring a party to prove every essential element of every claim of one's case to resist summary judgment where the burden of moving party is merely to "point out" without any evidence at all that no genuine issue of material fact exists for trial. Construction of the civil rules of procedure are grounds for certiorari.



Hickman v. Taylor, 329 U.S. 495 (1947),  
Schlagenhauf v. Holder, 379 U.S. 104, 109  
(1964). Such unbalanced rules are  
fundamental denial of due process and  
equal protection, particulatrly for a pro  
se litigant. Discovery is now absolutely  
necessary to avoid summary judgment,

14. Alternatively, If the Above  
Actions Are Not "So far departed from the  
Accepted and Usual Course of Judicial  
Proceedings As to Call for an Exercise of  
This Court's Supervision", then are said  
usual and accepted course of proceedings  
not in themselves a denial of equal  
protection and due process?

In addition to the reasons above, if  
this court conduct, including an apparant  
clandestine meeting between Counsel and  
District Court Judge, slight of hand wih  
respect to time extensions to Appellees,  
delay and improper response to discovery  
requests coupled with hastily railroaded  
summary judgment actions, whipsawing

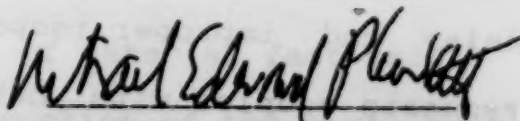
dismissal without prejudice by one tribunal into res judicata effect in another, judges ignoring their statutory duty to recuse themselves per 28 U.S.C. 455(a)(b)(c) etc., hastily decided and issued Appellate Memorandum ignoring facts, misstating others and ignoring Questions presented for review constitute denial of due process and equal protection in themselves. . This is of national concern to either those who have dared to take on the goliaths of finance.

Rule 14.1 (k) Appendix (Filed Separately).

Conclusion

For all the above reasons, Certiorari must be granted.

Respectfully submitted this 16th day of October, 1990 from Manhattan Beach, California.



Michael Edward Plunkett, pro  
se, Petitioner, on his own behalf and on

behalf of his partnership interests in  
Lane + Knorr + Plunkett Investment Company  
and Lane + Knorr + Plunkett Architects and  
Planners.

EDITOR'S NOTE

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90-651

Supreme Court, U.S.

FILED

OCT 16 1990

JOSEPH F. SPANGL, JR.  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL E. PLUNKETT, PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND

PLANNERS; LANE + KNORR + PLUNKETT,

INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT

COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE

CORPORATION, RECEIVOR OF FIRST INTERSTATE

BANK OF ALASKA; FIRST INTERSTATE

BANCORPORATION; FIRST INTERSTATE BANK OF

OREGON,

RESPONDANTS.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER 16, 1990.

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Facsimile Retyped

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MICHAEL E. PLUNKETT,

Plaintiff-Appellant,

and

LANE, KNORR & PLUNKETT, ARCHITECTS  
AND PLANNERS, LANE, KNORR & PLUNKETT  
INVESTMENT COMPANY, a/k/a  
LNPI Investment Company,

Plaintiffs-Appellants,

vs.

FEDERAL DEPOSIT INSURANCE  
CORPORATION, Receiver of First  
Interstate Bank of Alaska, FIRST  
INTERSTATE BANK CORPORATION, FIRST  
INTERSTATE BANK OF OREGON.

Defendants-Appellees.

Appeal from the United States  
District Court for the District of Alaska  
H. Russel Holland, District Judge,  
Presiding

Submitted: May 11, 1990\*\*  
Seattle, Washington

Before: FARRIS, PREGERSON, AND  
FERGERSON, Circuit Judges.

Michael E. Plunkett, a pro se

\* This disposition is not appropriate for  
publication and may not be cited to or by  
the courts of this circuit except as  
provided by 9th Cir. R. 36-3

\*\* The panel unanimously finds this case  
suitable for decision without oral  
argument. Fed. R. App. P1 34(a), Circuit  
Rule 34-4.

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MEMORANDUM

plaintiff and appellant, appeals summary judgment against him. Plunkett's suit pertains to circumstances surrounding two commercial loans he obtained from the Bank of Commerce (ABC) in 1981 and 1982. Plunkett was given a rate of interest by ABC pegged to the prime rate offered by the First National Bank of Oregon (FNBO) to FNBO's most creditworthy borrowers. FNBO, subsequently renamed First Interstate Bank of Oregon (FIBO), has been at all relevant times a wholly-owned subsidiary of First Interstate Bank Corporation (FIBC). In 1983, ABC entered into a franchise agreement with FIBC and was renamed First Interstate Bank of Alaska (FIBA) (now in receivership and represented as an appellee by the Federal Deposit Insurance Corporation).

Plunkett argues that FIBA, FIBO, and FIBC conspired with other, unnamed entities to fix the rate of interest offered to commercial borrowers, causing Plunkett to pay illegally inflated rates on his loans. He further contends that FIBO's definition of "prime rate" was intended to induce the false belief among its borrowers that the prime rate was the

lowest rate FIBO offered, and that the FIBA reference to that rate was the lowest rate FIBO offered, and that the FIBA reference to that rate on his loan instruments manifested a conspiracy between the two banks (and the Oregon bank's parent, FIBO) to deceive him. These contentions formed the basis for Plunkett's federal claims under section one of the Sherman Act, 15 U.S.C. §§ 1951, 1952, and hisendent Alaska claims (statutory, breach of contract, fraud, civil conspiracy, interference with contract, interference with prospective economic advantage, intentional infliction of emotional distress, and an assortment of so-called "prima facie torts of various descriptions," including "gross negligence, recklessness, ... wrongful foreclosure, usury, tortious breach of contract and others."

The district court granted summary judgment for FIBA, FIBO, and FIBO on the ground that Plunkett presented no credible evidence that the banks engaged in any actionable conduct. As a matter of law, the court held, no trier of fact could find for Plunkett.

## STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Kruso v. International Telephone & Telegraph Corp., 870 F.2d 1418, 1421 (9th Cir. 1989); State Farm Fire and Casualty Co. v. Martin, 872 F.2d 919, 920 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56 (c). Darrington v. Kincheide, 783 F.2d 874, 876 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Kruso v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989); Judge v. Hamilton, 872 F.2d 919, 920 (9th Cir. 1989).

## DISCUSSION

Plunkett insists that he established a prima facie case and is entitled to try it. First, he points to another case, Wilson Dev. Co. v. First Interstate Bank of Oregon, 605 F.Supp 590 (S.D. Cal. 1985), where a jury returned a verdict against

FIBO on a Sherman Act claim. Second, he appears to rely on another part of that case in its appellate incarnation, Wilcox v. First Interstate Bank of Oregon, 815 F.2d 322 (9th Cir. 1987), where summary judgment for defendant on a RICO claim was reversed and remanded. It was alleged in the Wilcox plaintiffs' RICO claim that FIBO made false representations about its prime rate being the lowest rate given to creditworthy borrowers. Plunkett apparently infers that the issue of whether FIBO misrepresented its interest rate is therefore triable here. Third, Plunkett asserts that FIBO actually participated in loans granted by FIBA during the period of Plunkett's loans, and argues that that participation constitutes evidence of rate-fixing activity and collusion by the banks in the fraud associated with FIBA's use of FIBO's prime rate as a reference for its own loans. Finally, Plunkett argues that a former loan officer at FIBO was subsequently employed in the same capacity by FIBA, further linking the activities of the defendants with respect to rate-fixing and FIBO's misrepresentation of its prime



rate.

The district court correctly ruled that Plunkett's facts cannot withstand a summary judgment motion under Fed. R. Civ. P. 56(c), as construed by Celotex Corp. v. Catrett, 477 U.S. 317 (1986), California Architectural/Building Products v. Franciscan Ceramics, 818 F.2d 1436 (9th Cir. 1987), cert. denied, 484 U.S. 1005 (1988), and Levin v. Knight, 780 F.2d 766 (9th Cir. 1986). First, as to the antitrust claim, Wilson, 815 F.2d 522, controls. We held there that a bank does not violate the Sherman Act simply by pegging its interest rate to the interest rates of other banks. A mere showing by a plaintiff of rate parallelism is not enough. Id. at 526. Plunkett has failed to demonstrate that FIBA's pegging of its rate to that of FIBO was anything but a legitimate business practice. In fact, he does not begin to approach the level of proof of unlawful concerted activity required for his antitrust claim, as the district court noted.

Second, as to the various claims deriving from Plunkett's fraudulent collusion theory, even assuming arguendo,

that FIBO and FIBC are liable for misrepresentation to Oregon borrowers, there is nothing in the record from which a trier of fact might reasonably conclude that Plunkett has a cause of action against FIBA, FIBO, and FIBC. He had no ~~business relationship~~ with either FIBO or FIBC and cannot demonstrate that any relationship either had with FIBA affected him. Neither the banks' business connections nor the fact that FIBA and FIBO may have employed the same loan officer at different times offers credible evidence of collusive conduct against Plunkett. The district court, it must be concluded, correctly rejected Plunkett's allegation that the banks conspired to defraud him.

Plunkett alternatively seeks to have his ppendent claims dismissed without prejudice. Since all of his claims, both state and federal, are based on an allegation of consowiracy, the district court rendered summary judgment against all of them. This was certainly within the court's discretion, Schultz v. Sundberg, 759 F.2d 714, 718, (9th Cir. 1985), and, especially given the factual

paucity of appellant's case, a proper exercise of discretion, Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984).

The district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, LANE + )	
KNORR + PLUNKETT, Architects) NO.A84-387	
and Planners, LANE + KNORR +)	Civil
PLUNKETT, Investment Company)	
and all others similarly )	
situated, )	
Plaintiffs, )	
vs. )	
FIRST INTERSTATE BANK OF )	
ALASKA, formerly Alaska )	
Bank of Commerce; FIRST )	
INTERSTATE BANCORP, FIRST ) ORDER	
INTERSTATE BANK OF OREGON; ) Summary Judg-	
formerly First National ) ment Granted	
Bank of Oregon, and Unknown )	
Defendants DOES 1 through 100)	

The court has now before it a motion by defendants First Interstate Bank of Oregon (FIBO) and First Interstate Bancorp (FIBC) seeking summary judgment. Judgment on the pleadings, and, alternatively, for a more definite statement. The motion is made pursuant to Rules 12(c) and 56, Federal Rules of Civil Procedure, and is made on the grounds that there are no genuine issues of material fact in dispute and that the defendants are therefore entitled to judgment as a matter of law, judgment on the pleadings, or, alternatively, a motion/order for a more Order (Summary Judgment Granted)

definite statement. The motion is opposed by plaintiff. The court has heard oral argument.

In 1981, the plaintiff executed a note to secure a loan from the Alaska Bank of Commerce in the amount of 1.667 million at an interest rate equal to 3.5% above "the prime rate". The note defined "the prime rate" as being "the prime rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON, to its most credit worth borrowers during the term of this note." On February 11, 1982, plaintiff borrowed \$335,600.00 from the Alaska Bank of Commerce, upon which interest was set at the "prime rate" of FIBO.

At the time the loans were made, the Alaska Bank of Commerce had no connection with either FIBC or FIBO. FIBO, formerly known as First National Bank of Oregon, was at all pertinent times a wholly-owned subsidiary of FIBC. Neither of FIBO or FIBC was involved in the loans to the plaintiff, nor did they have knowledge of the loans. Neither FIBO nor FIBC had (or have) any participation in the loans

In February 1983, the Alaska Bank of  
Order (Summary Judgment Granted).

Commerce entered into a franchise agreement with FIBC and changed its name to First Interstate Bank of Alaska (Interstate of Alaska). The franchise agreement did not result in either FIBC or FIBO obtaining any interest in First Interstate Bank of Alaska, nor did it result in either entity becoming a participant in the loan to the plaintiff.

Rule 56(c). Federal Rules of Civil Procedure, provides in relevant part.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The court views the evidence and the inferences therefrom in the light most favorable to the non-moving party. Levin v. Knight, 780 F.2d 786, 787 (9th Cir. 1986).

Three U.S. Supreme Court cases have clarified what a non-moving party must do to withstand a summary judgment motion. As explained by the Ninth Circuit in California Architectural Building Products, Inc. v. Franciscan Ceramics, Order (Summary Judgment Granted)

Inc., 818 F.2d 1466, 1468 (9th Cir 1987).

First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. See Celotex Corp. v. Catrett, [477 U.S. 317], 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 1477 U.S. 2421, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 103 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The plaintiff's revised second amended complaint makes eleven claims for relief.

The plaintiff's first claim for relief is that the defendants committed a violation of the "Sherman Act, 15 U.S.C. § 1, et seq." The plaintiff contends that the defendants engaged in this unlawful conduct as follows: first, FIBO engaged in unlawful conduct with persons not  
Order (Summary Judgment Granted)



named as defendants, by using the "count of four" method of setting the prime rate of FIBO. Second, FIBO and Interstate of Alaska conspired to fix prices and Interstate of Alaska subsequently contracted with the plaintiff.

The "count of four" method of setting a bank's prime rate involves a bank following the lead of four other major banks. This method of setting the prime rate has been expressly held as being non-violative of the Sherman Act. Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526 (9th Cir. 1987). The plaintiff claims that Wilcox is inapplicable to the instant case because Wilcox involved a bank exercising competitive independent business judgment.

"[T]he fact that competitors may see proper in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

Id. (citation omitted).

While the plaintiff's understanding of Wilcox is correct, he fails to provide the court with any facts which evidence  
Order (Summary Judgment Granted)

"any suppression of competition or show any sinister domination." Indeed, all of the plaintiff's argument in this regard amounts to pure allegation and speculation. FIBO and Interstate of Alaska had no relationship whatsoever at the time the subject loans were made. Furthermore, "[r]eliance on other banks' prime rate charges is a convenient and accurate way for [a bank] to maintain its prime rate at the level set by the national market." Id. The Ninth Circuit's decision in Wilcox is also highly instructive on the issue of a plaintiff's burden of proof in a Sherman Act case such as the case at bar. Specifically, the court in Wilcox held:

Horizontal price setting is illegal per se. The borrowers are not required to prove that defendants entered into an express agreement to fix prices. An agreement may be inferred from circumstantial evidence of "a common design and understanding, or a meeting of minds in an unlawful arrangement..." Nevertheless, when relying solely on circumstantial evidence, a plaintiff must present evidence from which an inference of conspiracy is more probable than an inference of independent action. The plaintiff's burden is to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that

Order (Summary Judgment Granted)

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the defendant acted independently of the alleged co-conspirators, and thus lawfully." Thus, antitrust law limits the range of permissible inferences from ambiguous evidence. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

Id. at 525 (citations omitted).

The plaintiff has failed to make a showing that there are genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. At oral argument on this matter, plaintiff argued that the mere denial of his allegations by officers of the defendant entities is not sufficient evidence to sustain their motion for summary judgment. The plaintiff fails to understand that, per California Architectural Building Products, Inc., 818 F.2d at 1468, as the non-moving party bearing the burden of proof at trial, he must make a showing sufficient to establish a genuine dispute of fact with respect to the existence elements of his case. The evidence submitted by the plaintiff simply fails to make such a showing.

The plaintiff contends that the Order (Summary Judgment Granted)

"placement of loan officers", including Robert McWhorther, a former FIBO employee, at Interstate of Alaska, supports his contention that there was a conspiracy to fix prices. This contention, along with the rest of plaintiff's arguments, does not meet the plaintiff's burden to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that the defendant acted independently of the alleged co-conspirators, and thus lawfully." In fact, McWhorther had been fired by FIBO and had himself filed a lawsuit against FIBO alleging breach of contract and outrageous conduct and deceit. There is no genuine issue of material fact in dispute as to whether or not McWhorther was a "plant" of FIBO. The facts (as opposed to plaintiff's speculation and conjecture) are that he was not.

Furthermore, the "correspondence" relationship between the banks that plaintiff contends is further evidence of a conspiracy is completely unsupported by any of the facts before the court. There  
Order (Summary Judgment Granted)

must have been some communication regarding Oregon's prime rate; but acquiring knowledge of what that rate was and merely referencing it is not a conspiracy.

Thus, the defendants' motion for summary judgment will be granted as to the plaintiff's first claim for relief.

The plaintiff's remaining ten claims for relief all hinge on the allegation that the FIBO and FIBC conspired between themselves and/or with other Entities. The plaintiff has failed to establish any conspiracy between defendants FIBC and FIBO and/or between either of those entities and the other defendants. Nor has the plaintiff made any showing whatsoever that FIBC or FIBO conspired with any other person or entity to do anything which would support any of the plaintiff's other ten claims for relief. In short, since the facts before the court do not indicate that there is any reason to believe that either FIBO or FIBC had any actionable connection whatsoever with the plaintiff, it is inevitable that summary judgment must be granted in favor

Order (Summary Judgment Granted)

of defendants FIBC and FIBO.<sup>1</sup>

For the foregoing reasons, the defendants' motion for summary judgment is hereby granted. Plaintiff's complaint against defendants First Interstate Bank of Oregon and First Interstate Bancorp is hereby dismissed.

<sup>1</sup>In light of this conclusion, the court need not address the defendants' alternative motions.

Dated at Anchorage, Alaska, this 12th day of May, 1989.

United States District Judge

cc: M. Plunkett  
J. Hedland (Hedland)  
J. Gorski (Hughes)

Order (Summary Judgment Granted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al.,	)	
Plaintiffs,	)	No. A84-387
	)	Civil
vs.	)	ORDER
FIRST INTERSTATE BANK OF	)	(Status
ALASKA, et al.,	)	Conference)
Defendants.	)	
	)	

---

A status conference was held in this case on september 19, 1988.

This case is again at issue with the filing of amended pleadings, including an answer of the Federal Deposit Insurance Corporation as receiver for First Interstate Bank of Alaska on June 23, 1988. The Court's stay on account of the involvement of the FDIC in the case has expired.

The court has pending a motion for summary judgment brought on behalf of First Interstate Bancorp and First Interstate Bank of Oregon. The parties are concerned that there is additional discovery which ought to be done as a predicate to the court's consideration of that motion. Counsel have agreed that

ORDER (Status Conference)



plaintiff will undertake such discovery as he deems necessary for purposes of the defendants' summary judgment motion. That discovery shall be completed on or before November 22, 1988. On or before December 7, 1988, plaintiff may file a supplemental opposition to defendants' motion for summary judgment. Defendants may file a supplemental reply on or before December 19, 1988.

The court and parties discussed, and it has been clearly understood, that plaintiff must accomplish any discovery which he deems necessary or appropriate to the summary judgment motion of defendants within the time provided hereinabove. It is equally clear, however, that should defendants' motion for summary judgment be denied, there may be additional discovery to be undertaken, and the court will address that possibility at a subsequent date.

Defendant FDIC has indicated that it will be filing a motion for summary judgment also. That motion shall be served and filed on or before October 20, 1988, in order that it may be considered

ORDER (Status Conference)

with the other defendants' like motion.

Dated at Anchorage, Alaska, this 21  
day of September, 1988.

\_\_\_\_\_  
United States District Judge

cc: M. Plunkett  
J. Hedlnad (HEDLAND)  
J. Gorski (HUGHES)

ORDER (Status Conference)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al.,	)	
Plaintiffs,	)	No. A84-387
	)	Civil
vs.	)	
FIRST INTERSTATE BANK OF	)	ORDER
ALASKA, et al.,	)	(re Motion
Defendants.	)	for Leave to
	)	Amend
	)	Complaint)
	)	

Plaintiff has <sup>again</sup> moved for leave to amend or supplement his complaint. Plaintiff urges in justification of the amendment that his complaint should be supplemented so as to take account of events which have transpired since his prior pleading was filed; and, to the extent that the ~~proposed~~ amended complaint would accomplish this, defendants make no opposition. Defendants do, however, oppose the filing of plaintiff's proposed pleading in a number of particulars. Defendants urge that Michael E. Plunkett, and co., may not represent partnerships as such, that plaintiff may not claim to represent a class of persons in this action, that plaintiff may not continue to

ORDER (re Motion for Leave to Amend Complaint) action,

urge a rule for unknown and unidentified defendants, and that plaintiff's allegations of a religious conspiracy are irrelevant to the case at bar.

By and large, the court has already ruled on the foregoing matters, and plaintiff would be well advised to refrain from calling on the court to make the same ruling twice absent a clear showing of changed circumstances.

The court has heretofore ruled that plaintiff, appearing pro se, may act for himself and in his capacity as a partner of certain partnerships. Plaintiff may not act as counsel for the partnerships of which he is a member, nor may he act as counsel for other partners of those partnerships. Plaintiff may represent his partnership interest alone.

This case has not been constituted a class action, and plaintiff Plunkett, appearing pro se, has not been, and in all probability would not be, permitted to act in substance as counsel for a class action.

The court has heretofore ruled that plaintiff was afforded ample opportunity

ORDER (re Motion for Leave to Amend Complaint) action,

to identify additional parties. He did not do so and has still not identified any additional necessary or indispensable party to this action. Accordingly, references to "unkown defendants" (in whatever number) is inappropriate.

The court has heretofore ruled that allegations of a religious conspiracy are irrelevant to the substance of Ipalintiff's complaint. Plaintiff has made no showing to the contrary.

Plaintiff shal revise his proposed second amended complaint in all of the foregoing respects, after which it may be served and filed on or before December 15, 1987.

Dated at Anchorage, Alaska, this 19th day of November, 1987.

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United States District Judge

cc: Michael Plunkett  
J.W. Sedwick (BURR)  
John Hedland (HEDLAND)

ORDER (re Motion for Leave to Amend Complaint)action,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al.,	)	
	)	No. A84-387
Plaintiffs,	)	Civil
	)	
vs.	)	ORDER
	)	(Motion to
FIRST INTERSTATE BANK OF	)	Amend Denied,
ALASKA, et al.,	)	Motion for
	)	Psychiatric
Defendants.	)	Examination
	)	Denied)

Plaintiff Michael E. Plunkett has moved for leave to file an amended complaint. Presumably this motion was filed for the reason that the proposed amended complaint does not comport with the leave to amend which the court had already extended to plaintiff during the course of a status conference. At that status conference, there was discussion of whether or not there were additional defendants who should be made party to this litigation. The court specifically called upon plaintiff to do the necessary investigation and, if he deemed it appropriate, name additional defendants in an amended complaint on or before July 30, 1987. Plaintiff's proposed amended com-

ORDER (Motion to Amend Denied; Motion for Psychiatric Examination Denied)

plaint, filed July 30, 1987, failed to name any new defendants. Rather, plaintiff's proposed amendment would perpetuated the uncertainty which he previously expressed about additional defendants by naming one hundred unknown John Doe defendants. In light of the discussions which the court had with plaintiff and defense counsel, the proposed amendment is outrageous. Despite the court's specific instructions that plaintiff carry out the necessary investigation, and despite the fact that this case was initially filed September 10, 1984, plaintiff still contends that there are "unknown" potential defendants.

The motion to amend is denied.

Defendants have countered plaintiff's motion to amend with their own motion that the court require plaintiff to submit to a psychiatric examination. The basis for this motion is plaintiff's apparent expressed belief that a conspiracy exists between financial institutions such as the named defendants and religious institutions. Plaintiff's notions in this regard are, to say the least, strange. The ORDER (Motion to Amend Denied; Motion for Psychiatric Examination Denied)



court is not convinced, however, that defendants have sufficiently shown, nor that plaintiff has sufficiently displayed on his own, behavior so bizarre and disruptive of court proceedings as to require plaintiff to submit to a psychiatric evaluation. At least for the present, the court is convinced that it can, through application of the federal discovery rules and the federal evidence rules, appropriately control these proceedings so as to restrict them to the exposition of issues relevant to plaintiff's complaint as filed.

The motion to require a psychiatric examination is denied.

DATED at Anchorage, Alaska this 16th day of September, 1987.

United States District Judge

cc: Michael Plunkett  
J.W. Sedwick (BURR)  
John Hedland (HEDLAND)

ORDER (Motion to Amend Denied; Motion for Psychiatric Examination Denied)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al.,	)	
	)	No. A84-387
Plaintiffs,	)	Civil
	)	
vs.	)	ORDER
	)	(Motion to
FIRST INTERSTATE BANK OF	)	Amend Denied,
ALASKA, et al.,	)	Motion to
	)	Participate as
Defendants.	)	<u>Amicus Curiae</u>
	)	Denied)

Plaintiff Michael E. Plunkett has moved for leave to file an amended and/or supplemented complaint herein. The motion is opposed by Defendant First Interstate Bank. Seemingly due to the somewhat unique circumstances of this case, the motion to amend has also resulted in the Court being deluged with several hundred pages of additional materials sponsored by the Anchorage School District, which Plaintiff would add as a party defendant by his amendment. The Court deems it unnecessary to consider the school district filings, and its motion to participate in this motion as and amicus party is denied.

Plaintiff Plunkett's motion to amend  
ORDER (Motion to Amend denied, Motion to Participate as Amicus Curiae Denied)

must be denied even though, as the parties point out, amendments to pleadings are to be freely permitted by the Court. Rule 15, Federal Rules of Civil Procedure. In this instance, it is clear that what Plaintiff Plunkett characterizes as his ninth and tenth claims for relief are unnecessary. Perhaps understandably, the pro se plaintiff here does not appreciate, nor do his pleadings comport with, the requirements of Rule 8(a), Federal Rules of Civil Procedure, which provides in pertinent part.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

The allegations of the ninth and tenth claims for relief which Plaintiff would add are unnecessary. It is inappropriate that parties plead the evidence which they will produce in support of their claims.

Plaintiff Plunkett's eleventh claim for relief would add two new parties to

ORDER (Motion to Amend denied, Motion to Participate as Amicus Curiae Denied)

this case. The Ninth Circuit, however is hostile to the concept of pendent party jurisdiction. In Safeco Insurance Co. of America v. Guyton, 692 F.2d 551 (9th Cir. 1982), the court stated that:

We have repeatedly held that parties may not be added to an action absent an independent jurisdictional base for inclusion and that pendent party jurisdiction will not substitute for complete diversity or a federal question.

Id. at 555.

While the proposed eleventh claim for relief is inadequately pleaded in terms of Rule 8, Federal Rules of Civil Procedure, it is nonetheless apparent that Plaintiff Plunkett would assert a common law civil conspiracy cause of action against the two new parties. This is a court of limited jurisdiction, and an allegation of common law civil conspiracy does not establish an independent jurisdictional base for the aforementioned claim. No federal question is apparent and diversity jurisdiction would not exist as to the new parties.

Plaintiffs' motion to amend adding Count Eleven is denied.

ORDER (Motion to Amend denied. Motion to Participate as Amicus Curiae Denied)

DATED at Anchorage, Alaska, this 7th  
day of November, 1986.

United States District Judge

cc: Michael Plunkett  
George Weiss  
J.W. Sedwick (Burr)

ORDER (Motion to Amend denied, Motion to  
Participate as Amicus Curiae Denied)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL E. PLUNKETT,	)	
	)	
Plaintiff- Appellant	)	Filed
	)	July 18
and	)	1990
	)	
	)	No. 89-35500
LANE, KNORR & PLUNKETT,	)	
ARCHITECTS AND PLANNERS;	)	
LANE, KNORR, & PLUNKETT	)	
INVESTMENT COMPANY, a/k/a/	)	
LKP Investment Company,	)	
	)	
Plaintiffs- Appellants)	)	
	)	
vs.	)	
	)	
FEDERAL DEPOSIT INSURANCE	)	
CORPORATION, Receiver of	)	
First Interstate Bank of	)	ORDER
Alaska;; FIRST INTERSTATE	)	
BANK CORPORATION; FIRST	)	
INTERSTATE BANK OF OREGON,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

Before: FARRIS, PREGERSON, and FERGUSEN,  
Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

Facsimile: Retyped from Original

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Facsimile:: Retyped from Original



PETITION FOR REHEARING

SUGGESTION FOR REHEARING EN BANC

INTRODUCTION

A. Petition for Rehearing

In the judgment of the Appellant, the following situations exist:

1. A material point of fact or law was overlooked in the decision.

2. An apparant conflict with another decision of the court which was not addressed in the memorandum exists.

B. Points Raised on Petition for Rehearing

1. Material Facts Overlooked.

(a) First Interstate Bank of Oregon ("FIBO") was not at all relevent times a wholly owned subsidiary of First Interstate Bancorp ("FIBC"). Court Memorandum (hereafter "CM") at page 2. FIBO was formerly First National Bank of Oregon at relevent times, particularly when the first of the two loans was

executed in December, 1980. RB, Addendum 1, page 1. CR 1, Ex. 2 page 1.

(b) That FIBO, FIBC and First Interstate Bank of Alaska, ("FIBA") did not just conspire with other unnamed banks, but acted independantly and/or conspired with each other. CM at 2. CR 80, p 4,5,6,20,22, 11-27 . (Revised Secod Amended Complaint). CR 1 (Verified Complaint), CR 10 (Verified Proposed First Amended Complaint)

(c) It was FIBA's definition of the prime rate, not FIBO's definition of the prime rate that was intended to induce the false belief among FIBA borrowers that the prime rate was the lowest rate the participating and corresponding bank, FIBO, offered. CM @ 2. CR 80, page 20, CR 1 (Verified Complaint), para. 10.

(d) That the Court overlooked the claims against FIBO, FIBC, and/or FIBA based on Alaska's Consumer Protection

Statute, AS 45.50.471 et seq., Alaska Restraint of Trade Statutes, AS 45.50.562 et seq. , Alaska Banking and Usuary Statutes, AS 06.05.280, AS 45.45.010, breach of implied covenant of good faith and fair dealing (CR 80, p25), defamation (CR 80, p. 19). CM at 2,3. CR 80, pp. 14-27.

(e) The Court overlooked that evidence was produced which showed or raised a genuine issue of material fact for trial whether the method of FIBA's pegging of the prime rate to FIBO's prime rate was a "legitimate business practice". That is, the court upheld FIBA's fraudulent definition of the FIBO prime rate as a "legitimate business practice", and held further that FIBO and FIBC knowledge of FIBA's fraudulent definition and FIBO or FIBC failure to correct the erroneous definition as not being a violation of Anti Trust or RICO statutes.

CM at 4-5.

(f). The court overlooked the fact that not all claims derive from the fraudulent collusion theory but are based on independant wrongs as well. CM at 5. CR 80, para. 42,44, 48,50, 70, 68,71,72,78 etc.

(g). The court errored in statement of fact that misrepresentation took place by FIBO and FIBC as to Oregon borrowers, where the evidence shows the opposite, that is, FIBA misrepresented to Alaska borrowers that FIBO's prime rate was the rate charged FIBO's most credit worthy borrowers. CM at 5. CR 1, (Verified Complaint) exhibit 2, page 1, CR 80, Ex. 2 page 1.

(h) The court errored in overlooking Affidavits CR 4,12,14,38,96,110, , , verified complaint (CR 1), verified proposed amended complaint (CR 10), and other evidence (CR 1 Exhibit 2, page 1, CR

80, Exhibits 1-5, in holding nothing in the record allows for a fact finder to conclude a cause of action exists against either FIBO, FIBC and FIBA. CM at 5.

(i) The court erred in its statement that no business relationship existed between Appellant and FIBO and FIBC. CM at 5. Homan stated (CR 110) he could not remember if Plaintiffs' loans were participated by FIBO or FIBC, raising a genuine issue of fact for trial, since FIBO, FIBC, and FIBA held all the evidence and refused to release same. Further, Appellant and all others similarly situated are third party beneficiaries of any participation loan and/or franchise relationship between FIBC, FIBO and FIBA.

(j) The Court erred in its statement that no relationship between FIBO or FIBC and FIBA affected Appellant. CM at 5. The loan participation relationship caused the misrepresentation

of FIBO prime rate definition by FIBA. CR 1 (Verified Complaint). CR 110 (Affidavit of Homan). FIBO had to have loan documents on whose face the prime rate was misdefined, yet on these participation and other loans where said definition was misdefined, FIBO and FIBA did nothing.

(k) The Court erred in stating the bank's business connections did not offer credible evidence of collusive conduct against Appellant. CM at 5. CR 110 proved FIBO and FIBA participated. Wilcox, 815 F.2d 522 proved FIBO and FIBA had to meet on participation loans to discuss interest rates. CR 110 proved interest rate definition was set up for the purpose of FIBO participation.

(l) The court erred in stating all claims were based on an allegation of conspiracy, when in fact individual claims were plead. CM at 5. See item h above for reference in pleadings.

2. Material Points of Law Overlooked  
in the Memorandum

(a). The Court overlooked that fact the District Court did in fact dismiss the pendant claims as to FIBA without prejudice, CT at 13,14, CR 113, Memorandum, page 2 (FDIC seeks dismissal of pendant claims for refiling in state court), yet District Court erred in not specifically so stating in Judgment, sufficient to avoid Res Judicata in State Court, which occurred, Reply Brief Addendum 2. CM at 5. Court erred in not applying FRCP 42(b) which states dismissal is without prejudice on jurisdictional dismissals.

(b). The court erred in ruling that court evaluated evidence to determine no "credible" evidence existed. CM at 2, 5. See argument below.

(c). The court erred in holding the district court properly rejected



Appellant's allegation that the banks conspired to defraud him. CM at 5. As discussed above and argued below sufficient admissable evidence is of record to raise a genuine issue of material fact as to whether FIBO and FIBA conspired to overcharge Appellant and others of the class, and/or to raise a genuine issue of material fact as to whether FIBO and FIBA buried the misrepresentation after learning about same.

(d). The Court overlooked and/ or otherwise failed to address the following relief sought by Appellant.

(i) Whether the Court erred in denying Motions for Leave to Amend, including inclusion of class allegations and parties, inclusion of religious issues, Anchorage School District Defendants, other conspiracy claims, unknown defendants (Appellant Brief,

hereafter "AB" at 1-2).

(ii) Whether the entire process before the court constitutes denial of due process and/or equal protection to a pro per or other litigant, bias by the court.

AB at 2.

(iii) Whether the Court acted unreasonably in granting summary judgment to FDIC prior to opposition by Plaintiff.

AB at 2.

(iv) Whether Court erred in failing to give notice to Pro Per Plaintiff of substantive evidentiary changes required in opposing motions for Summary Judgment.

AB at 2

(v) Other issues as outlined in Brief:

(a) That the failure of the court to give pro per Plaintiff substantive notice of changes in summary judgment opposition requirements, not spelled out in local rules be certified for appeal to

U.S. Supreme Court. AB at 48.

(b) That Judgment must be reversed for fraud upon the court by FIBA. AB at 46-47.

(c) That the court find that money is a commodity for purposes of imposing 15 U.S.C. 13 in this case. Reply Brief ("RB") at 26.

(d) That AS 45.50.471 et seq. applies to loans, is not exempt, and that summary judgment was improper for FIBA, FIBO and FIBC failed to point out no genuine issue of material fact existed. RB at 26.

(e) That A.S. 06.05.280 is not subject to the limitations of AS 45.45.010 and that summary judgment must be vacated. RB @ 26.

(e). The court overlooked the Supplemental Addendum to Appellant Brief and Reply Brief, Citation to Supplemental Authorities to Appellant Brief and Reply

Brief, and Errata to Appellant Brief and Reply Brief served on May 11, 1990 and received by the Court on May 14, 1990, while Memorandum was typed, filed, and mailed by 16 May 1990..

(f). That the court erred in stating that Appellants's facts cannot withstand a summary judgment motion. CM at 2. See argument below and above.

(g). That the court incorrectly held Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522 (9th Cir. 1987) as controlling as to antitrust claims. CM at 4.

(h). The court erred in upholding the district court's holding the level of proof was inadequate. CM at 5.

(i). The court erred in upholding district court's weighing of the credibility of the evidence. CM at 2,5.

(j). The court erred in holding all allegations were based on the allegation

of conspiracy, and that therefore pendant claims could be dismissed with prejudice. Claims were independantly based as well, CR 80, para. 42, 44, 48, 50, 70, 68, 71, 72, 78 and others.

(k). The court errored in holding dismissal of pendant claims was within the district court's discretion. Court improperly relied on Schultz v. Sunberg, 759 F.2d 714, 718 (9th Cir. 1985), and Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984), which cited United Mine Workers v. Gibbs, 383 U.S. 715, 726-727, 16 L.Ed. 2d 218, 228-229, 86 S.Ct. 1130, which specifically stated, 16 L.Ed. 2d at 228:

Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without

prejudice and left for resolution of state tribunals.

(1). The Court overlooked the evidence in holding the factual paucity was grounds for proper exercise rather than abuse of discretion, when in fact the standard of review for granting summary judgment on the pendant claims is "de novo" rather than "abuse of discretion". CM at 3,5-6.

(m). As to pendant claims, Court overlooked Alaska law which rejected prima facie case standard for resisting summary judgment. See argument below.

3. An Apparant Conflict with Another Decision of the Court Which Was Not Addressed in the Opinion.

(a). The Memorandum conflicts with Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522, (9th Cir. 1987). see below.

(b) The Memorandum conflicts with McElyea v. Babbitt, 833 F.2d 196,197-198 (9th Cir. 1987) where this court ruled a verified complaint could be used to resist summary judgment. RB @ 1.

(c) The Memorandum conflicts with Jacobsen v. Filler, 790 F.2d 1362-1367 (9th Cir. 1986) in that Jacobsen ruled that notice was given of the procedural requirements by virtue of its local rule requirements, rules which do not exist in Alaska.

#### B. SUGGESTION FOR REHEARING EN BANC.

The following grounds exist for a rehearing en banc:

1. Consideration by the full court is necessary to secure or maintain uniformity of its decisions.

2. The proceeding involves questions of exceptional importance.

3. The memorandum directly conflicts with an existing opinion by another court



of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

### ARGUMENT

#### A. PETITION FOR REHEARING.

##### 1. Facts Overlooked.

As demonstrated above, the author of the Memorandum intentionally misstated virtually every admissable fact. Simply put, the loans in question (real estate, not commercial loans per se) were variable interest loans pegged to the prime rate (not the prime commercial rate stated in the original committment agreement) of the First National Bank of Oregon, later purchased (not merely renamed) by FIBC and renamed FIBO. The court erred in calling the loans "commercial" and erred in stating that at all relevent times FIBO was a wholly owned subsidiary of FIBC. When FIBC was purchasing First National

Bank of Oregon, the first subject loan was already in place.

Appellant argued not just that FIBO, FIBA and FIBC conspired with other unnamed banks but with each other, particularly FIBC with First National Bank of Oregon, Alaska bank of Commerce with FIBC and FIBO. Most importantly, a prima facie case was made that Alaska Bank of Commerce conspired with First National Bank of Oregon and later with First Interstate Bank of Oregon to misrepresent the prime rate to its Alaska borrowers by misdefining the prime rate as the rate FIBO charged its most credit worthy borrowers during the term of the note. Further, assuming FIBA's definition of the prime rate was an innocent mistake, FIBO did nothing once it had loan documents in hand with said definition on it to have FIBA renegotiate said prime rate to correct said misrepresentation. FIBO did

nothing even when FIBA negotiated a second note with Appellant with the same definition upon it (presumably). Court also misstates that FIBA, FIBO and FIBC conspired with others to fix the rate of interest charged to "commercial" borrowers. Not so. The word "commercial" is not used by Appellant. See CR 1 (Verified Complaint), CR 80 .

Court mistates that FIBO misdefined its prime rate when clearly the evidence shows the misstatement was accomplished by FIBA. Memorandum intentionally completely misrepresents the facts, ostensibly to lay the groundwork to support its affirmation of the District Court.

The Court ignored other admissable facts providing prima facie evidence of coercion, extortion, breach of implied covenant of good faith and fair dealing, defamation, breach of contract, wire

fraud, mail fraud, etc..

Argument Regarding Discussion

Appellant relies on Wilcox, 815 F.2d 522, (9th Cir. 1987) to demonstrate Appellant is entitled to trial on RICO claims. That FIBO was alleged to have also misrepresented its prime rate as the rate charged its most credit worthy borrowers is also germane, but not the important issue as to Wilcox.

The Court holds the evidence does not meet the standards of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), California Architectural Building Products v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987), Levin v. Knight, 780 F.2d 786 (9th Cir. 1986), yet ignores the fact the state of Alaska in Moffat v. Brown, 751 P.2d 939, (Ak. 1988), rejected the prima facie case standard. Thus even if Federal claims fail (which is denied), pendant claims must not as genuine issues have

been raised sufficient to meet the Alaska standard. Federal Courts are bound to apply state law to pendant claims. United Mine Workers v. Gibbs, 16 L.ed. 2d at 228, 383 U.S. at 726, citing Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.ed. 1188, 58 S.Ct. 817, 114 ALR 1487. As to Levin v. Knight, the court misapplied said case, which reversed a summary judgment deals exclusively with the statute of frauds, not an issue in this appeal.

That Wilcox controls as to Antitrust claims is a misstatement of the facts. FIBA did not merely peg its prime interest rate to that of FIBO. It misdefined FIBO'S interest rate on the face of many real estate loan forms, sent the loan forms to FIBO for participation. FIBO did nothing to correct the misrepresented prime rate on said standardized loan forms. By FIBO's admission in Wilcox, FIBO had to meet with FIBA on participation loans to discuss,

among other things, interest rates. 815  
F.2d at 527 and n. 4! The Court stating  
that said practice of falsifying interest  
rate definitions was legitimate business  
practice by FIBA and not making any effort  
to correct same by FIBO or FIBC as also  
legitimate business practice is for the  
court to aid and abet fraudulent  
misrepresentation, collusion to commit  
fraudulent misrepresentation, aiding and  
abetting a conspiracy in restraint of  
trade. By so doing, the court in effect  
becomes an accessory after the fact to  
these felonious, criminal and wrongful  
acts.

Having now misconstrued virtually all  
the relevent admissable facts, the court  
then states Appellant does not begin to  
approach the level of proof of unlawful  
concerted activity, when in fact a prima  
facie case was set out for both per se and  
rule of reason standards(assuming but not

conceding the prima facie case must be met). Further, one need not, even to meet the prima facie case standard, meet the trial level of proof, but only raise genuine issues of material fact as to an essential element of Appellant's case. Since Plaintiff, Appellant has raised genuine issue sufficient to infer the existence of a conspiracy between FIBA and FIBO, and FIBA and FIBC, and FIBO and FIBC and First National Bank of Oregon and FIBC, FIBA and other local banks in denial of loans to Plaintiff/ Appellant, as well as overt acts in furtherance of each said conspiracy, and injury as a result, summary judgment must be denied.

Having now made a totally false misstatement, the Court proceeds to elaborate on same. On page 5, the Court assumes, "arguendo" that FIBO, misrepresented its prime rate to its borrowers rather than the actual condition



of FIBA misrepresenting FIBO's prime rate to FIBA's Alaska borrowers and proceeds compound the error. First, Appellant's claims do not wholly derive from collusion, and do not rely on said collusion for their existence, particularly in the Consumer Protection Statute violations by FIBO (AS 45.45.471 et seq.) and the breach of implied covenant of good faith and fair dealing, defamation, etc.. See references to separate claims above.

Memorandum next states nothing in the record exists from which a trier of fact might reasonably conclude that Appellant (Appellant represents his partnership interests as well) has a cause of action against FIBO, FIBC and FIBO. From the record, Appellant certainly has a cause of action against FIBO, FIBA, and/or FIBC.

The court next falsely states that

Appellant cannot demonstrate that any relationship FIBO or FIBC had with FIBA affected Appellant. Absolutely untrue. The participation relationship in which the falsified prime rate definition was allowed to slide once First National Bank of Oregon and later FIBO knew about it ( when the first potential participation loan document was received from Alaska Bank of Commerce) caused enormous injury to Appellant, CR 1,

Next, the Court erred in weighing the evidence, citing lack of credible evidence that the relationship between FIBO, FIBC and/or FIBA offers credible evidence of collusive conduct against Plunkett. This court has repeatedly held that the District Court or Appellate Court on review shall not weigh the evidence but review same in light most favorable to nonmoving party. CM at 2, AB at 18.

As to pendant claims there are at

least three errors. First, Court used abuse of discretion standard to review granting of summary judgment on pendant summary judgment rather than de novo review. CM at 5-6. Next, pendant claims as to First Interstate Bank of Alaska were dismissed without prejudice, Transcript at 13,15, FRCP 42(b) CR 113, Memorandum, page 2,, as affirmed by the Court, but FDIC now claims both here and in Alaska Superior Court case 3AN-87-9269 that adjudication was accomplished on the merits and summary judgment was granted with dismissal being with prejudice. RB at 2, Addendum 2. This Court failed to address the issue as to whether the District Court erred in its transformation of a dismissal without prejudice to an adjudication on the merits. The third and most important error is the Court's presumption that all pendant claims, both against FIBO and FIBC and against FIBA are based on an

allegation of conspiracy. This presumption is absolutely false. Even FDIC, FIBO and FIBC concede claims independant of collusion exist. CR 85, Memorandum. Virtually all pendant claims are individually based. Therefore, the very premise upon which the disriot court granted summary judgment as to FIBO and FIBC is erroneous. As this court improperly concluded said basis was also the reason the district court granted summary judgment as to FIBA, it compounded the error even further.

Finally, what is paucious is the Memorandum author's attention to the admissable evidence, not the paucity of the factual case itself. This case represents a culmination of a nationwide pattern of felonious conduct by scores of banks, and the aiding and abetting of misrepresented prime rates by various courts throughout the land.

Argument as to Suggestion for  
Rehearing En Banc

1. Consideration by the full court is  
necessary to secure or maintain uniformity  
of its decisions.

Since Wilcox, 815 F.2d at 528-532 clearly remanded case allowing RICO claims to go forward, and as Memorandum failed to address Motions to Amend and Class Issues, (class issues were allowed to go forward in Wilcox, at least as to RICO claims), to maintain uniformity, and thereby not deny Appellant equal protection under the law, a rehearing en banc on the Motion to Amend and RICO issues must be granted. Further, the Wilcox case antitrust decisions were based on "mere" parallelism, whereas the instant case relies on participation between the two banks who collude to misdefine the prime rate together, or alternatively FIBO allows FIBA to continue

its misrepresentation with full knowledge of the fraud. The other different element is the group boycott of Appellant by other Alaska Banks both before the loans were made (but after contact was made with Alaska Bank of Commerce) and after FIBA called the loans. To secure consistency with Wilcox, rehearing en banc must be granted as Wilcox is clearly not controlling as the Memorandum states.

2. The proceeding involves questions of exceptional importance.

FIBA counsel claimed at least 15 lawyers approached him about the rate definition fraud. This would be Alaska borrowers. What is horrifying however is the degree to which various courts would stoop to uphold decisions against borrowers on the fraudulent definition and discounting claims throughout the nation. Although some cases were settled

favorably, see Citation of Supplemental Authorities of May 10, 1990 by Appellant, many opinions dismissed the claims, particularly on fixed rate cases pegged to the prime rate, as opposed to variable rate cases like the instant loans. One case was denied because the attorney had an oversized Appendix (3000 pages). NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th cir. 1987)(no pun intended).

The other exceptionally important issue is equal protection under the law. The rule 56 requirements for resisting summary judgment must be recodified so that a new lawyer, and a pro se litigant, may have the benefit of clear English requirments that (i) a cause of action consists of essential elements (ii) to resist summary judgment an opponent must submit admissable evidence that creates a genuine issue of material fact as to at



least one essential element for each cause of action for which summary judgment is sought and for which movant has pointed out no genuine issue exists.

3. The memorandum directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

Memorandum conflicts with Jaxon v. Circle K Corp., 773 F.2d 1138, 1139-1140 (10 Cir. 1985) in that it upholds the district Courts' failure to disclose the more stringent requirements of Celotex, Anderson, Mitsushida, and California cases. This Court's decision in Jacobsen v. Filler 790 F.2d 1362, 1363-1367 (9th Cir. 1986) is in conflict with Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985) and therefore a national issue

regarding rule 56 exists. Said issue is whether (1) the rule must be rewritten or local rules adopted clarifying the result of the recent Supreme Court Opinions, and/or (2) whether non prisoner, pro se litigants are entitled to "special consideration" such as procedural and/or substantive aid in describing the requirements necessary to resist a summary judgment motion. The 10th circuit has clearly stated that such aid is to be given, citing Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984) while this circuit has clearly stated to the contrary at least as to substantive aid. It is nothing else, as to the instant case rule 56 as to whether procedural aid is also to be denied, particularly with respect to recent changes in the law such as Celotex. For these reasons a rehearing en banc must be granted.

### Conclusion

The rush to judgment in this appeal was so accelerated, presumably so the Court would not have to deal with the supplemental authority, time did not permit investigation of decisions reached since case was submitted. a granting of rehearing en banc would at least give reasonable time to investigate same. Further time did not permit research of 9th circuit opinions 88-2540, and 4th circuit opinion 88-2521 either of which may present a basis for rehearing or rehearing en banc.

Dated at Manhattan Beach, California  
this 30th day of May, 1990.

---

Michael E. Plunkett, pro se

Facsimile: Retyped from Original

James M. Gorski  
Hughes Thorsness, Gantz, Powel and Brundin  
509 W. third Ave.  
Anchorage, AK 99501  
907-274-7522

Attorneys for Federal Deposit Insurance  
Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. A84-387
	)	
FIRST INTERSTATE BANK OF	)	
ALASKA, et al.,	)	
	)	
Defendants.	)	
	)	

---

FINAL JUDGMENT

This court having granted motions for  
summary judgment in favor of the  
defendants,

IT IS HEREBY ORDERED AND ADJUDGED that  
plaintiffs' complaint against defendants,  
First Interstate Bank of Oregon, First  
Interstae Bancorp, and FDIC, receiver of  
First Interstate Bank of Alaska, is hereby  
dismissed.

Facsimile:: Retyped from Original

Facsimile: Retyped from Original

Dated at Anchorage, Alaska, this 18  
day of June, 1989.

/s/\_\_\_\_\_

U.S.DISTRICT COURT JUDGE

cc. O&J 3571  
M. Plunkett  
J. Hedland (HEDLAND)  
J. Gorski (HUGHES)

7585n

Facsimile:: Retyped from Original

66

Michael E. Plunkett, Pro Se  
600 Barrow, Suite 600  
Anchorage, Alaska 99501  
(907) 277-5481

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett, et al)

Plaintiffs.

v.

First Interstate Bank of  
Alaska, formerly, Alaska  
Bank of Commerce, et al,

Defendants

CASE NO. A 84-387 Civil

AFFIDAVIT OF CHARLES HOMAN

STATE OF ALASKA

THIRD JUDICIAL DISTRICT)

) s.s.

Charles Homan, being duly sworn,  
deposes and states:

1. I am Charles Homan, have personal  
knowledge of the following facts, am  
competent to testify as to the following  
facts, and if called upon to testify at a  
hearing or at trial would testify as  
follows:

2. I was Vice President of Alaska

AFFIDAVIT OF CHARLES HOMAN

Page 1

Bank of Commerce in Anchorage, Alaska, during the period in which Lane + Knorr + Plunkett Investment Company, an Alaska General Partnership consisting of Michael Edward Plunkett, and Donald R. Knorr applied for and obtained interim financing for the construction of an Office-Condominium complex known as the 600 Barrow Building located on Block 110, Lot 1, of the Original Townsite of Anchorage, Alaska.

3. During the time in which Lane + Knorr + Plunkett Investment Company was applying for and secured interim financing for the 600 Barrow Project I was the Commercial Loan Officer at Alaska Bank of Commerce most familiar with the project and the loans.

4. I was employed as Vice President of Alaska Bank of Commerce when it changed its name to First Interstate Bank of Alaska in 1983.

5. I left employment of First

AFFIDAVIT OF CHARLES HOMAN

Page 2

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Interstate Bank of Alaska in February, 1984.

8. Lane + Knorr + Plunkett Investment Company executed two interim finance agreements entitled "Deed of Trust Note" with Alaska Bank of Commerce. The First Deed of Trust Note was in the loan amount of \$1,667,200, and was originally due and payable on June 15, 1981. A copy is attached hereto as Exhibit 1, The second Deed of Trust Note was in the amount of \$355,600.00 and was executed on February 11, 1982. A copy of the Second Deed of Trust Note is attached hereto as Exhibit 2.

7. Exhibits 1 and 2 hereto were standard Deed of Trust Note forms used by Alaska Bank of Commerce. The forms used in the preparation of Exhibit 1 and 2 hereto. Exhibits 1 and 2 hereto were prepared for signature by Lane + Knorr + Plunkett Investment Company under my supervision.

9. I executed loan documents on

AFFIDAVIT OF CHARLES HOMAN

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behalf of Alaska Bank of Commerce in conjunction with the loans secured by the Deed of Trust Notes contained in Exhibits 1 and 2 hereto and was authorized to do so by the Board of Directors of Alaska Bank of Commerce.

7. Both Exhibit 1 and Exhibit 2 based the rate of interest to be charged on three and one half points above the prime rate charged by the First National Bank of Oregon, subsequently called the First Interstate Bank of Oregon. The "prime rate" was defined in the Deed of Trust Notes as "the rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON to its most credit - worthy borrowers during the term of this note. The Deed of Trust Notes were set up in this fashion so that if First Interstate Bank of Oregon, formerly First National Bank of Oregon, were to participate with Alaska Bank of Commerce in any of many commercial interim finance loans being

made during the 1980-1982 period, the interest rates would correspond with the published prime rate of First National Bank of Oregon, now First Interstate Bank of Oregon.

8. During the 1980 through 1984 period Alaska Bank of Commerce (later called First Interstate Bank of Alaska) participated with First Interstate Bank of Oregon, formerly First National Bank of Oregon in many interim finance loans. I have no specific recollection whether Exhibits 1 and 2 hereto were loans in which First National Bank of Oregon and/or First Interstate Bank of Oregon participated with Alaska Bank of Commerce, (later called First Interstate Bank of Alaska).

7. While still employed by First Interstate Bank of Alaska, I learned that a consumer group had brought a class action suit against First Interstate Bank of Oregon claiming that First Interstate

Bank of Oregon had discounted loans below  
their published prime interest rate.

FURTHER YOUR AFFIANT SAYETH NAUGHT

---

Charles Homan

Subscribed and sworn to before me  
this \_\_\_\_ day of September, 1988.

---

Notary Public for Alaska  
My Commission Expires \_\_\_\_\_

Certificate of Service

I hereby certify that on \_\_\_\_  
September, 1988 I caused to be  
hand delivered a copy of the  
above Affidavit with Exhibits to  
the offices of John Hedlund and James  
Gorski, counsel of record in this case.

---

Michael E. Plunkett, Pro Se

Michael E. Plunkett, Pro Se  
600 Barrow, Suite 600  
Anchorage, Alaska 99501  
(907) 2775481

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ALASKA

Michael E. Plunkett: Lane + Knorr + )  
Plunkett, Architect and Planners: )  
Lane + Knorr + Plunkett Investment )  
Company: )

Plaintiffs )

v. )

First Interstate Bank of Alaska, )  
formerly, Alaska Bank of Commerce: )  
First Interstate Bancorp; First )  
Interstate Bank of Oregon, formerly )  
First National Bank of Oregon; )

Defendants. )

No. A84-387  
Civil

AFFIDAVIT OF MICHAEL E. PLUNKETT  
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT  
BY DEFENDANTS FIRST INTERSTATE BANK OF  
OREGON AND FIRST INTERSTATE BANCORP MOTION  
FOR CONTINUANCE; MOTION TO STRIKE  
AFFIDAVITS

STATE OF ALASKA )  
THIRD JUDICIAL DISTRICT ) s.s.

Michael E. Plunkett, being duly  
sworn, deposes and states:

1. I am Michael Edward Plunkett, am  
a plaintiff in this action; am owner of  
Lane + Knorr + Plunkett, Architects and  
Planners, also Plaintiffs in this action.

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 1

2. I have personal knowledge of the following facts, am competent to testify as to them, and if called upon to testify at trial or hearing would testify as follows:

3. The first information I ever received that First National Bank of Oregon was not a participant in the loans which are the subject of this litigation was when I read the Affidavits submitted with the Motion for Summary Judgment on March 30, 1988. It was indicated to me at the time we signed the loans that First National Bank of Oregon, later First Interstate Bank of Oregon was the basis of the prime rate determination because said bank was to be or was the corresponding bank on the loan. The pegging of the prime rate to the First National Bank of Oregon was also a condition of the Commitment letter of May, 1980, a certified true and correct copy which is included as Exhibit 2, pages 35-42.

4. I hereby certify that Exhibits 1-5 attached to the complaint are true and correct copies of the various

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 2

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correspondance and loan documents executed by Plaintiffs in this case. As late as October 16, 1982 the second loan was extended, with the interest rate pegged to the prime rate of First Interstate Bank of Oregon.

5. I hereby certify that a continuance is needed due to the stay granted to First Interstate Bank of Alaska as succeeded by Federal Deposit Insurance Corporation. Plaintiff cannot conduct discovery against First Interstate Bank of Alaska until the Revised Second Amended Complaint is answered by FIBA employees like Chuck Homan or R.J. Miller, without the documentation to refresh their memories would be a waste of time, particularly since the interest pegging decision had to be made prior to May 1980. I further certify that I am financially unable to conduct discovery in Oregon or to even pay the costs for copies of the transcripts from the Court cases held in Oregon. Further, from the affidavits of FIBO employees, it is clear that they do not recollect, at least without documentary evidence or other depositions to help,

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 3



them, any dealings at all with Alaska Bank of Commerce or FIBA. Thus requests for admission, interrogatories, and/or requests for production of these unstayed defendants would be of little value. However, I certify that a continuance is necessary to the extent the motion for summary judgment cannot be denied outright so that at least paper discovery of FIBO and FIBC can be made. Interrogatories will at least theoretically require the parties to conduct some investigation of records. Unfortunately, records may have vanished, and any decision regarding how the prime rate definition was generated may rest only in the minds of the one or two individuals who made the decision.

6. I have reviewed the affidavits of Moving Party and hereby certify that sufficient hostility exists between FIBA employees, former, particularly Robert McWhorter, Frank Kauffman, Albert Swallin, Charles Homan and others that I could not obtain an affidavit voluntarily from them, and even if I could their recollections would be so vague without some refreshment

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 4

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by documentary evidence that the affidavits would be insufficient to resist the motion, that is to provide more genuine issues of material fact.

7. In 1979 I was led to believe by a Alaska Bank of Commerce Officer Johnson that financing had been obtained for our building through Oregon Trails Savings and Loan. Later this statement was repudiated by others at ABC. Oregon Trails was to be a participant and the prime rate was to be based on the Oregon Trails Prime Rate. When later, after Plaintiffs literally handed the takeout financing for the project to Homan from Alaska Small Business Loan Program, the commitment letter had the First National Bank of Oregon listed as the basis for the prime rate. t

9. When in early 1983 I learned of the franchise with FIBC, and had known of the buyout of First National Bank of Oregon, I was not surprised when Bob McWhorter became in charge of commercial loans, since I learned he had been with FIBO in Oregon, Eugene I think I learned. Kauffman had come aboard earlier, and

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 5

after McWhorter took over things deteriorated. It was my analysis that McWhorter was either reporting to or looking out for the interests of the parent, FIBC, or the participant, FIBO. Things immediately soured with FIBA and Plaintiff. FIBA started obtaining certificates of deposit from the Anchorage School District in large amounts like \$25,00,000 in a give month. At the same time credit was denied Plaintiffs, with McWhorter stating we were on an increasing spiral of debt or words to that effect. This was immediately after Plaintiff was terminated from its services on the Gruening Junior High School Project by ASD.

10. Plaintiffs incorporate all affidavits on file in this case as if fully set forth herein.

(j)11. I certify further discovery is needed to determine the amount and style of interaction, if any between First Interstate of Oregon and First Interstate Bancorp and First Interstate of Alaska. This is especially true due to the fact

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 6

that to continue to obtain funds from ~~A~~ASD, FIBA may have had to accede to the demands of ASD, such as squeezing Plaintiffs. This would benefit not just FIBA but the franchisor FIBC particularly if the franchise was on a percentage basis, and FIBO if they were participating with FIBA on any loans, of any kind, or FIBA was participating in some other way.

12. We were charged in excess of \$55,000 in loan fees on the first interim loan alone. No architects or engineers were ever retained to visit the site or review the design. This amount is either as a result of the risk incurred, or the fact that a portion of the loan fee went to a participant.

12. I first learned of the antitrust litigation in May 1984 when I read the article in the newspaper about the outcome of the trial. I had remembered that our loans were based on the prime rate of FIBO and called to find out what was going on.

13. In 1984, to attempt to avoid foreclosure, Plaintiffs submitted loan packages to every bank in town. Each one denied credit to Plaintiff for various

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 7

reasons. The banks were uniformly vague about the reasons except a few, such as Mike Van at Alaska Continental Bank who specifically stated that the lawsuit with ASD would have to go away before any money would be lent. National Bank of Alaska was the funniest. Jan Sieberts signalled the loan officer in my presence. Thereafter I was put off by Mr. Struts (Sp?) and finally denied credit. Alaska State Bank strung us along for several months before before turning us down. Clearly all had communicated with FIBA. FIBA had supposedly related to Rogers and Babler or MAPCO Alaska Inc. employees as early as 1982 the false hood that Plaintiffs were nearly bankrupt. Alaska State Bank is the only Alaska bank to which I have first hand knowledge that they discounted below their prime rate. I never found out how they defined their prime rate however. They discounted on point below prime to the City of Unalaska on a School and Swimming Pool interim loan for which plaintiffs were the architects. I also learned from Mood's Industrial File

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 8

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that Don Mellish, former Chairman of the Board of National Bank of Alaska was a Board Member of Mapco Inc. parent of MAPCO Alaska Inc. during this period.

15. During the course of the troubles with FIBA, they notarized a Uniform Commercial Code filing signature by myself by affixing a notary that had not even been issued at the time the signature was affixed. This was reported to the Alaska State Troopers who claimed it was a civil matter.

16. Each Month we received a loan statement through the mail with the interim finance interest rate for that month printed on it. That rate, after telephoning FIBO was always 3.5 points above the prime rate given us by FIBO for the particular month. Thus, as the prime rate had been admittedly discounted, said prime rate cannot be the prime rate charged FIBO's most credit worthy borrowers.

17. I learned from counsel for plaintiffs in Wilcox case that FIBO had made some loans at a rate as low as 6%. This could have been 7 to 8 points below

the prime rate or more during the time that the loans were in place since the prime rate was as big as 21% at one point.

18. While designing a branch bank for FIBA on the layout FIBC wanted, signage, and other features. FIBC clearly was involved with the design and had decision making control over it to an unknown amount.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Michael E. Plunkett

Subscribed to and sworn before me  
this 25 day of April 1989.

Notary Public for Alaska  
My Commission Expires

AFFIDAVIT OF MICHAEL E. PLUNKETT  
Page 10

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MICHAEL E. PLUNKETT, PRO SE  
600 Barrow, Suite 200  
Anchorage, Alaska 99501  
(909)276-4939

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al                    )  
- Plaintiffs.                                    )  
  )  
vs.    )  
  )  
FIRST INTERSTATE BANK OF                    )  
ALASKA, formerly Alaska Bank                )  
of Commerce, et al.                            )  
  )  
Defendants.                                        )

CASE NO. A84-387 Civil

STATE OF ALASKA                                )  
  )  
THIRD JUDICIAL DISTRICT                      )

AFFIDAVIT OF MICHAEL E. PLUNKETT

1. I am Michael E. Plunkett and am  
a Plaintiff in this case and am  
representing myself and my interest in  
Lane + Knorr + Plunkett, a partnership in  
which I have 65% interest and Lane Knorr  
Plunkett Investments.

2. I am competent to testify as to  
the verity, and I have personal knowledge  
of the following facts and if called upon  
to testify under oath would testify as  
follows:

3. I first read of the jury decision  
in U.S. Oregon District Court, Case NO.

81-1127-RE, in spring of 1984, May 16, 1984 Anchorage Times.

4. On the day the article appeared, in the late afternoon, Rosita Worl (who is known as my sister-in-law but is actually a cousin of my wife but they were raised in the same home as sisters), called me and wanted to go out on the town right away at 5:00 P.M. This was unusual in that such social arrangements were always made with my wife, and (2) she knew I usually worked late.

5. Rosita Worl's good friend and attorney was Ralph Duerre, partner in Burr, Pease & Kurtz, attorneys for First Interstate Bank Corporation. Ralph had billed time to First Interstate Bank on our problems with said bank and had reviewed a partnership agreement amendment for Roland Lane, former partner in Lane + Knorr + Plunkett Architects in early 1983.

6. So unusual was Rosita Worl's contact in #4 above that (1) when I read the newspaper the next day (a day late) and saw the article on the jury verdict on the Oregon Case, I was fully convinced at the time that Ralph had asked Rosita to

AFFIDAVIT/Page 2

divert our attention on that date in the hopes we would miss the article. I was the only one who would have linked our loan with First National Bank of Oregon. I actually had to look up the note (Exhibit 2, Page 1 to Complaint) to confirm the same bank in Oregon was a defendant in the newspaper article. So upset was I by this tactic and by other tactics used by Burr, Pease & Kurtz, I had actually considered naming them in this action. But for Weiss' not wanting to do so, as a condition of taking the case, I may well have done so.

7. At that time Lane + Knorr + Plunkett Investments and Lane + Knorr + Plunkett was represented by D. John McKay of Middleton, Timme, and McKay. Subsequent to reading about the verdict in Oregon, I contacted attorney, Henry Carey, and I talked to one of his associates about the outcome of the case. I asked if they would be interested in representing us against First Interstate, et al in Alaska. I was told I would have to talk to Mr. Carey. Mr Carey was extremely difficult to get ahold of. When I finally got a

AFFIDAVIT/Page 3

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hold of him and I explained the situation regarding imminent foreclosure, he said I should fire my attorney and sue him for ~~malpractice~~ for his failure to forestall sale.

8. In the time trying to talk to Mr. Carey and to find out about the case, I contacted Copeland and Landrye because I had met the local attorney, Wolf, and knew they had a Portland office. I requested copies of relevant documents from the Court regarding the case. A month or so later, on July 25, 1984, all I received was a copy of Exhibit One to the Complaint, and a copy of a previously published RICO opinion referenced on Exhibit One, along with a bill for \$100.00. This was, in a word, disappointing and I got the distinct impression I was being put off and/or stalled.

9. Jerry Kurtz of Burr, Pease & Kurtz and Commercial Loan Officer, was threatening all kinds of action and I brought up the fact I knew about the Oregon Case. Kurtz got defensive and claimed some 15 others had brought up the

AFFIDAVIT/Page 4

same issue, all for naught. As I recall, he did, however, offer to restructure the loan, cancel the foreclosure in exchange for abandoning all claims or interest overcharge, etc.

10. There was no question Kurtz was trying to belittle the <sup>3</sup>interest overcharge claims but at the same time was trying to avoid us filing a claim against FIBA, FIBO or FIBO~~X~~.

11. As a result of the intensity of Case 3AN-83-4318 (claims regarding the Gruening School), and the costs of retaining counsel, McKay, having to joust with insurance counsel and dissatisfaction therefrom, I began to advertise for a staff attorney. I interviewed three respondents. Weiss was the only one interested. After being retained or shortly before he came by one Saturday to discuss the case, he had on a three piece suit. When asked about his dress, he said he had to meet someone at the jail. I thought it unusual dress for going to the jail. I believe now he was going to meet with counsel for FIBA or gave the appearance of same.

AFFIDAVIT/Page 5

12. I had discussed having Carey represent us against First Interstate. He wanted to associate with someone local. He suggested Ron Bliss and someone from Landrye, (Paragraph 8 above), I was opposed to that. Bliss would not accept due to a presumed conflict with his client in Case 3AN-83-4318 above.

13. After relating my conversation with Carey about firing McKay to McKay, I stated I wanted him to get the foreclosure put off, or I would have to find someone else. I suggested he talk to Carey. He did. He related Carey apologized profusely. When I next contacted Carey Carey said he was not providing representation. I did ask him to send relevant court documents like the jury verdict, etc. All I got after paying \$300.00 was a copy of some of the jury instructions, and amended complaint. Again, I was convinced I was being put off, this time by Carey.

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MICHAEL E. PLUNKETT, PRO SE  
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Anchorage, Alaska 99501  
(909)276-4939

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al       )  
Plaintiffs.                        )  
vs.                                    )  
FIRST INTERSTATE BANK OF        )  
ALASKA, formerly Alaska Bank    )  
of Commerce, et al.               )  
Defendants.                          )

CASE NO. A84-387 Civil

ERRATA TO MICHAEL E. PLUNKETT'S  
AFFIDAVIT

Please substitute Exhibit "G" Page 1,  
and 2 for Exhibit "D" included in  
Affidavit of Michael E. Plunkett dated  
October 11, 1985.

Please substitute Exhibit "H" for a  
new Exhibit "H" (attached hereto),  
included with Affidavit of Michael E.  
Plunkett dated October 11, 1985.

Delete Exhibit 2 from said document.

Respectfully submitted this 15th day  
of October, 1985 at Anchorage, Alaska.

Michael E. Plunkett, Pro Se

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12.  
MICHAEL E. PLUNKETT, PRO SE  
600 Barrow, Suite 200  
Anchorage, Alaska 99501  
(909)276-4939

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, )  
Plaintiffs. )

vs. )

FIRST INTERSTATE BANK OF ) (STATE OF ALASKA)  
ALASKA, formerly Alaska Bank ) )  
of Commerce, et al. ) (THIRD JUDICIAL )  
Defendants. ) (DISTRICT )

CASE NO. A84-387 Civil

AFFIDAVIT OF MICHAEL E. PLUNKETT

1. I am Michael E. Plunkett and am a  
Plaintiff in the above captioned  
and have control of the

Investment Company and Lane + Morr +  
Plunkett Architects and Planners (65%).

2. I have personal knowledge of the  
following facts and competent to testify  
as to them and if called upon to testify  
would testify as to the following.

3. I am representing myself and my own  
interest in this action.

4. On February 11, 198 I executed as  
partner in LKP Investments a Deed of Trust  
filed at Book 703 at Page 292 in the  
Anchorage Recording District, Third  
Judicial District. On September 12, 1984  
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First Interstate sold at auction two parcels of real property to satisfy said obligation. The instant lawsuit was filed and a motion for Temporary Restraining Order was denied to enjoin the sale. The sale and auction too, place and the equity loss arising therefrom to plaintiffs was included in my Affidavit of September 10, 1984 which listed an equity loss of \$74,000.

5. As a direct result of this equity loss and the cash loss arising from the overcharged interest rates and loans to LKP Invest., Lane + Knorr + Plunkett Architects was unable to continue making cash rent payments to LKP Investment Company which in turn was unable to continue to make the mortgage payments. As a proximate cause, the long term Deed of Trust was declared in default and a sale at auction advertised for October 15, 1985.

6. The equity losses which will immediately occur are outlined as follows:

Principal balance (per default and	
sale notice, Exhibit "A"	1,084,000.00

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Interest costs and attorneys  
fees (estimated) 150,000.00

Property value (per Exhibit "B"  
which I certify is a true and  
correct copy of a Letter of  
Opinion furnished by the  
appraiser

2,100,000.00±

Total Equity

\$ 866,000. —

Estimate value of Parcel 4. 400,000.

(Based on sale of \$220,000

for south half Lot 12B,

Block 112, Original Townsite  
of 4,000 s.f.)

First Deed of Trust, Lot 3,

Block 111

48,000.

Less payments owed, Lot 3,

Block 111

3,600.

Equity for Lot 3, Block 111 348,000.

Total Equity, subject to

immediate loss through

sale

4  
1,214,000. —

7. A best-estimate of the long range  
losses which will accrue as a result of the  
loss of these properties is as follows:

The estimated losses as a result of the 600  
Barrow foreclosure are through the loan

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payoff date are

Depreciation loss(pre tax)	2,100,000.00
Cash flow loss	600,000.00
Additional 6% equity increase per annum due to scarcity and location(not escalation) (1995)	1,900,000.00
Principal payoff	<u>1,084,000.00</u>
Parking lot equity increase	400,000.00
Principal payoff	<u>48,000.00</u>
TOTAL	\$6,132,000.00

After 600 Barrow mortgage is paid off,  
the next 10 years show a much larger  
increase due to lack of mortgage payment.  
(1985) dollars)

Cash flow	3,000,000.00
Less costs, taxes, etc.	<u>1,000,000.00</u>
	2,000,000.00
Additional equity increase due to scarcity(6% per yr)	4,000,000.00
Less balloon payment at end of mortgage.(estimate)	(500,000.00)
Parking lot increase (additional)	400,000.00
TOTAL	<u>\$5,900,000.00</u>

8. The total immediate and long range  
losses which will arise if the foreclosure  
takes place \$13,246,000.00.

9. As a further consequence of the  
overcharged interest rates as outlined in  
the instant lawsuit, Michael Plunkett  
individually was required to sell property  
in Homer, AK for which the proceeds were  
used to pay Lane + Knorr + Plunkett  
partnership debts. Said debts arose at  
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least in part as a result of LKP Investments' inability to repay its obligations to pay Lane + Knorr + Plunkett Architects and Planners in the form of reduced rent or rental offsets. Said inability was in turn proximately caused by the interest overcharge and default and sale of September 12, 1984. As Michael Plunkett was utilizing said sales to pay partnership debts, it was unable to make the remaining two property payments thereby causing a default of the unsubdivided property whose value is as follows:

Subdivided sale value	\$150,000
Principal and interest balance of sale	<u>36,000</u>
Equity	\$124,000
Less estimated subdivision costs	<u>25,000</u>
Equity	\$100,000

As a proximate result of this loss, Michael Plunkett's ability to borrow funds to subdivide and/or sell the property even at a distress sale price.

10. Although LKP Investments, its partners, and guarantors were served with a copy of the recorded notice of default. Lane + Knorr + Plunkett Architects, its  
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agents or principals, lease tenant of commercial Unit 2 were never personally delivered or mailed by certified mail a separate copy of the recorded notice of default. A true and correct copy of the envelopes is attached as Exhibit "C".

11. Verification of the proposed supplemental and/or amended complaint. I have drafted and read the proposed amended and/or supplemental complaint in the above entitled action and the same is true and correct to the best of my knowledge and belief.

12. I, through counsel for Don Knorr, Robert C. Schubert, Esq. have attempted to have First Interstate postpone the foreclosure until after the mandatory settlement conference is held in Anchorage Superior Court, Case 3AN-83-4318 Civil, but First Interstate Bank refuses until the instant case is dismissed with prejudice. The Settlement Conference was ordered on September 27, 1985. As a result, there was insufficient time to file the motion for preliminary injunction in time to allow responsive pleadings, a hearing and a decision prior to October 15, 1985, thus

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necessitating the Ex Parte Motion for Temporary Restraining Order since immediate irreparable injury, loss, and damage will result to affaint before the adverse parties on their attorneys can be heard in opposition.

13. As Pro Se litigant, pursuant to Rule of Federal Procedure 65(b), I hereby certify that the motion for preliminary injunction with attachments and supporting documents and/or Temporary Restraining Order have been served on counsel for First Interstate Bank of Alaska and to Lawyer's Title, Inc. The Motion for Leave to Amend pleadings with attachments and supporting documents has also been served on above mentioned counsel and Lawyer's Title, Inc. The requisit<sup>e</sup> notice pursuant to local rules and rules of Federal procedure could not be met since:

(1) The decision to order a mandatory settlement conference was not made until September 27, 1985.

(2) Parties were attempting to negotiate a voluntary postponement of the sale up through the week ending October 4, 1985.

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(3) It was not discovered until Wednesday, October 9, 1985 that AS.34.20.070(c)(3) and (4) had not been compiled with by defendant First Interstate Bank of Alaska, thereby, not allowing sufficient time before 15 October, 1985 sale date to file a motion with required time for responsive pleading. for the above reasons notice should not be required.

14. In April, 1985 a Federal Tax lien was filed at the Anchorage Recorder's Office against Roland H. Lane, Donald R. Knorr, and Michael E. Plunkett doing business as Lane + Knorr + Plunkett Architects and Planners. A true and correct copy of this Federal Tax lien is included as Exhibit D. Ruth Donadio of our office called Mr. Knight of the Internal Revenue Service. I heard from Ruth that Mr. Knight had not received a copy of the Notice of Default and sale scheduled for October 15, 1985. To the best of my knowledge and belief, the Internal Revenue Service was not mailed or personally delivered a copy of the Notice of Default and sale required by

AS.34.20.070(c)(4).

15. Attached as Exhibit E is a true and correct copy of the Notice of Default and election to sell scheduled for October 15, 1985 to Michael E. Plunkett.

16. Attached as Exhibit F is a true and correct copy of the Notice of Default and election to sell advertised in the Anchorage Daily News.

17. Attached as Exhibit G is a true and correct copy of the deed of Trust Note securing the property subject to the sale.

18. Attached as Exhibit H is a true and correct copy of a loan agreement between Ray E. Lane and Michael E. Plunkett which indicates a prime rate loan. Exhibit 2, Page 1, to the Complaint.

19. Should the sale go ahead on October 15, 1985, Lane + Knorr + Plunkett Investment Company will instantly become insolvent. Since the single largest definitive asset of Lane + Knorr + Plunkett Architects is the loan to LKP Investments, this insolvency of LKP Investments will immediately cause the insolvency of Lane + Knorr.

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insolvency of its individual partners who will be looked to cover the debts of the two partnerships or the partners will be unable to proceed with the instant litigation or any other litigation and will be unable to recover any damages. The cases will undoubtedly be dismissed for want of prosecution if nothing else. Thus the injury to plaintiffs will in fact be irreparable and irrecoverable if the sale is allowed to go forward.

20. Prior to the September, 1984 default sale, a Bruce McIntyre agreed to purchase one of the units subject to the sale. An earnest money agreement was filled out and given to McIntyre for signature. In the meantime, approval to postpone the foreclosure subject to the sale to McIntyre was agreed by Jerry Kurtz, First Interstate counsel. Just as approval to postpone foreclosure was obtained, McIntyre backed out prior to signing the earnest money agreement stating the sale on their home in Missoula, Montana had fallen through. Subsequent phone calls to a realtor in Missoula indicated no such offer on the subject property had fallen through but

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that in fact a contingency offer had been made and was still valid. Some time later I noticed in the <sup>n</sup>Anchor Recorder's office that Mr. and Mrs. Bruce McIntyre had a Deed of Trust from First Interstate Bank on a home in Huntington Park. That property had sold after notice of default to First Interstate Bank who had defaulted the developer Ray-Mar Builders. This sale had occurred in June, 1984.

21. Exhibit "I" to the Affidavit of Michael E. Plunkett is a copy of the First Amended Complaint in the referenced actions.

22. Michael E. Plunkett, Pro Se, and litigant hereby certifies that a Motion for Shortened Time is necessary for Motion for leave to Amend. The Complaint due to the fact that the violations of AK. Statutes regarding sale by trustee had been found on Wednesday, October 9, 1985 and to the extent that said pleadings must be amended prior to granting Temporary Restraining Order can be issued without amendment to the pleadings or until opposing counsel has time to respond to amend pleadings, said Motion for Shortened Time is not necessary.

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FURTHER AFFIANT SAYETH NAUGHT.

Michael E. Plunkett, Pro Se .

SUBSCRIBED AND SWORN to before me this  
11th day of October, 1985 at Anchorage,  
Alaska.

Notary Public in and for the  
State of Alaska. My Commission  
Expires: 12-18-88 . Page 11

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George E. Weiss, Attorney for Plaintiffs  
P.O. Box 3130  
Anchorage, Alaska 99510  
(907) 274-2760

Michael E. Plunkett, pro se  
600 Barrow Street, Suite 200  
Anchorage, Alaska 99501  
(907) 276- 4939

BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett; Lane + Knorr +)  
Plunkett, Architects and Planners; Lane +)  
Knorr + Plunkett Investment Company, )  
also) known as LKP Investment Company; )  
Michael Plunkett, Inc.; and all others )  
similarly situated, )

Plaintiffs, )

v. )

First Interstate Bank of Alaska, formerly )  
Alaska Bank of Commerce; First Interstate )  
Bank of Oregon, formerly, First National )  
Bank of Oregon; Alaska Title Guaranty )  
Agency, Inc.; and unknown Defendants, )  
Does 1 through 35, )

Defendants. )

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No. A84-387 Civil

Affidvit of Michael E. Plunkett 9/10/84

STATE OF ALASKA )  
 ) ss.  
THIRD JUDICIAL DISTRICT)

Michael E. Plunkett, being duly

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sworn, deposes upon his oath and states:

1. that I am a Plaintiff in the above entitled action.

2. Verification of the Complaint.  
That I have read the Complaint in the above entitled action and the same is true to the best of my knowledge and belief.

3. That in regard to the property described in the Complaint, the Plaintiff's present alleged indebtedness is approximately \$274,000 on both parcels.

4. That the present market value of the real property parcels is as follows:

a) 600 Barrow , Unit E \$250,000

b) seacliff Terrace, Unit 5-A  
\$108,000

Total value \$350,000.00

5. That the Plaintiffs present equity in said real estate is thus:

a) Gross Equity in both units  
\$84,000

b) less related expenses (taxes

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homeowners dues, utilities, etc.) -\$8,000  
est.

Net equity	\$74,000.00
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and that Plaintiffs stand to lose that equity and value, if the Defendants are permitted to proceed with the foreclosure and sell the properties at a foreclosure sale.

8. That I presently have an offer and earnest money on the Seacliff Terrace property; but Defendant, First Interstate Bank of Alaska, has unreasonably refused to forestall and postpone the foreclosure sale to allow the prospective buyer to perfect a closing.

7. That I personally had no knowledge of the misrepresented interest rate until I read about the Oregon antitrust action in the newspaper this year; and that to the best of my knowledge and belief, none of the Plaintiffs had any such knowledge prior to my bringing it to their

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attention.

8. that I involved in defending other alleged to be multimillion dollar litigation; and that I believe my cash shortfall, which occurred during the course of the payments at the floating rate on the loan to First Interstate Bank of Alaska (Bank of Commerce) to be a significant factor in liability attributed to Plaintiffs in that other litigation.

9. That a completed foreclosure and sale may serve to invite other creditors of Plaintiffs to unnecessarily push Plaintiffs into insolvency and related proceedings.

10. that at the time of the notice of default, Plaintiffs had been about \$10,000 in alleged arrears, a sum considerably less than the wrongful interest overcharges at the time.

FURTHER AFFIANT SAYETH NAUGHT.

Michael E. Plunkett /s/  
Michael E. Plunkett

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Came before me one Michael E. Plunkett, known or proven to me to be the person described in the above instrument, and he subscribed to and swore to the truth of the same, all before me this \_\_\_ day of \_\_\_ 198\_\_.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR ALASKA  
MY COMMISSION EXPIRES\_\_\_\_\_  
(Notary Seal of George Weiss affixed)

Plunkett v. 1st Interstate Bank- Affidavit

**§ 4. Impeachment.** The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III.

**§ 1. Judicial power; tenure of office.** The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

**§ 2. Jurisdiction.** The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.<sup>7</sup>

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

**§ 3. Treason; proof and punishment.** Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

<sup>7</sup>. See 11th amendment.

## ARTICLE IV.

**§ 1. Full faith and credit among states.** Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

**§ 2. Privileges and immunities; fugitives.** The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the state from which he fled.

**§ 3. Admission of new states; power over territory and other property.** New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

**§ 4. Guarantee of republican form of government.** The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

## ARTICLE V.

**Amendment of the Constitution.** The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendment to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures

of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

#### ARTICLE IV.

**Debts; supremacy; oath.** All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States.

#### ARTICLE VII.

**Ratification and establishment.** The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.<sup>8</sup>

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.



# AMENDMENTS TO THE CONSTITUTION.

## ARTICLE I.

**Freedom of religion, of speech and of the press.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>9</sup>

## ARTICLE II.

**Right to keep and bear arms.** A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.<sup>10</sup>

## ARTICLE III.

**Quartering of soldiers.** No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.<sup>11</sup>

## ARTICLE IV.

**Searches and seizures.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>12</sup>

## ARTICLE V.

**Rights of accused in criminal proceedings; due process; eminent domain.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor



shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>13</sup>

#### ARTICLE VI.

**Right to speedy trial, witnesses, etc.** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.<sup>14</sup>

#### ARTICLE VII.

**Trial by jury in civil cases.** In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.<sup>15</sup>

#### ARTICLE VIII.

**Bails, fines and punishments.** Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.<sup>16</sup>

#### ARTICLE IX.

**Reservation of rights of the people.** The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.<sup>17</sup>

## ARTICLE X.

**Powers reserved to states or people.** The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.<sup>18</sup>

## ARTICLE XI.

**Restriction of judicial power.** The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.<sup>19</sup>

## ARTICLE XII.

**Election of President and Vice President.** The electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each. They shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of two thirds of the states; and a majority of all states shall be necessary to a choice. — The Vice President chosen shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The

person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President should be eligible to that of Vice President of the United States.<sup>20</sup>

#### ARTICLE XIII.

§ 1. **Slavery abolished.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. **Enforcement.** Congress shall have power to enforce this article by appropriate legislation.<sup>21</sup>

#### ARTICLE XIV.

§ 1. **Citizenship rights not to be abridged by states.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. **Apportionment of representatives in Congress.** Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such

state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

**§ 3. Persons disqualified from holding office.** No person shall be a Senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

**§ 4. What public debts are void.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**§ 5. Power to enforce article.** The Congress shall have power to enforce by appropriate legislation, the provisions of this article.<sup>22</sup>

#### ARTICLE XV.

**§ 1. Right to vote not to be abridged.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

**§ 2. Power to enforce article.** The Congress shall have power to enforce this article by appropriate legislation.<sup>23</sup>

## EXECUTIVE ORDERS

### EXECUTIVE ORDER NO. 12022

Ex.Ord. No. 12022, Dec. 1, 1977, 42 F.R. 61441, as amended, formerly set out as a note under this section, which related to the National Commission for the Review of Antitrust Laws and

Procedures, was revoked by Ex.Ord. No. 12258, Dec. 31, 1980, 46 F.R. 1251, set out as a note under section 14 of Title 5, Appendix I, Government Organization and Employees.

#### § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

#### § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

#### Historical and Statutory Notes

**1974 Amendment.** Pub.L. 93-528 substituted "a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years" for "a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year".

**Legislative History.** For legislative history and purpose of Pub.L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6335.

#### Federal Practice and Procedure

Enforcement of patent procured by fraud as violative of this section, see Wright, Miller & Kane: Civil 2d § 2761.

Labor disputes within jurisdiction of federal courts, see Wright, Miller & Cooper: Jurisdiction 2d § 3581.

Obligation of party opposing summary judgment to present evidence, see Wright, Miller & Kane: Civil 2d § 2739.

Propriety of summary judgment in complicated and important litigation, see Wright, Miller & Kane: Civil 2d § 2732.1.

#### Federal Jury Practice and Instructions

Antitrust—conspiracy—contract in restraint of trade, see Devitt and Blackmar § 55.01 et seq.

Antitrust—"private" action for treble damages, see Devitt, Blackmar & Wolff: Civil § 90.01 et seq.

#### West's Federal Forms

Actions by apparent agents of defendants, see § 1596.5.

Answers, see § 2019.5.

Complaints—

Discriminatory prices affecting competition, see § 1601.3.



#### **§ 4. Jurisdiction of courts; duty of United States attorneys; procedure**

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

#### **§ 5. Bringing in additional parties**

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

July 2, 1890, c. 647, § 5, 26 Stat. 210.

#### **§ 7. "Person" defined**

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

#### **§ 12. Words defined**

"Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Oct. 15, 1914, c. 323, § 1, 38 Stat. 730.

### **§ 13. Discrimination in price, services, or facilities—Price; selection of customers**

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods,



wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

**Burden of rebutting prima-facie case of discrimination**

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

**Payment or acceptance of commission, brokerage or other compensation**

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

**Payment for services or facilities for processing or sale**

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

**Furnishing services or facilities for processing, handling, etc.**

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

**Knowingly inducing or receiving discriminatory price**

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

**Sale, etc., on agreement not to use goods of competitor**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

**§ 15. Suits by persons injured; amount of recovery**

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages he sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

**§ 15b. Limitation of actions**

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283.

## § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.)

### Historical and Revision Notes

**Reviser's Note.** 1948 Act. Based on Title 18, U.S.C., 1940 ed., § 338 (Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130).

The obsolete argot of the underworld was deleted as suggested by Hon. Emerich B. Freed, United States district judge, in a paper read before the 1944 Judicial Conference for the sixth circuit in which he said:

"A brief reference to § 1341, which proposes to reenact the present section covering the use of the mails to defraud. This section is almost a page in length, is involved, and

contains a great deal of superfluous language, including such terms as 'sawdust swindle, green articles, green coin, green goods and green cigars.' This section could be greatly simplified, and now-meaningless language eliminated."

The other surplusage was likewise eliminated and the section simplified without change of meaning.

A reference to causing to be placed any letter, etc. in any post office, or station thereof, etc. was omitted as unnecessary because of

## CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

### Sec.

- 1961. Definitions.
- 1962. Prohibited racketeering activities.<sup>1</sup>
- 1963. Criminal penalties.
- 1964. Civil remedies.
- 1965. Venue and process.
- 1966. Expedition of actions.
- 1967. Evidence.
- 1968. Civil investigative demand.

### § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.



## **§ 1962. Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections <sup>1</sup> (a), (b), or (c) of this section.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

<sup>1</sup> So in original. Probably should be "subsection".

## **§ 1964. Civil remedies**

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

## **§ 1965. Venue and process**

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

## **§ 1966. Expedition of actions**

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)



## **§ 1967. Evidence**

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

**Sec. 06.05.280. Bank fees and charges connected with mortgage loans.** (a) A bank may require borrowers to pay only the necessary expenses incurred in connection with the making, closing, disbursing, extending, readjusting or renewing of mortgage loans, including, when appropriate, documented secretarial expenses, documented loan supervision expenses, appraisal, attorney, abstract, filing, recording and registration fees, title examinations, title insurances, mortgage insurances, credit reports, surveys, drawings of papers, escrow services, mortgage loan collection account services, and taxes or charges imposed upon or in connection with the making, recording or filing of a mortgage, deed of trust, or other security instrument intended to perfect a security interest related to the mortgage loan. A bank may also require borrowers to pay the cost of all other necessary and incidental services furnished by the bank or by others in connection with mortgage loans, including the costs of services of inspectors, engineers, architects or others reasonably required to evaluate or administer the mortgage loan. The charges by a bank may be collected by the bank from the borrower or added to the mortgage loan amount, and charges by a third party may be collected by the bank from the borrower and paid to the third party, or may be paid directly to the third party by the borrower.

(b) The fees and charges authorized by (a) of this section are in addition to the interest authorized by law, and are not a part of the interest collected or agreed to be paid on a mortgage loan within the meaning of any law of the state which limits the rate of interest. Any such fees and charges or possible fees and charges shall be disclosed and explained to the borrower in advance, in a manner that the department may direct.

(c) A director, officer, or employee of a bank may not receive a fee or other compensation of any kind in connection with obtaining a mortgage loan from a bank, except for services actually rendered as provided in this chapter. (§ 20 ch 169 SLA 1978)

**Sec. 11.31.100. Attempt.** (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

**Sec. 11.31.110. Solicitation.** (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

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(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

- (1) class A felony if the crime solicited is an unclassified felony;
- (2) class B felony if the crime solicited is a class A felony;
- (3) class C felony if the crime solicited is a class B felony;
- (4) class A misdemeanor if the crime solicited is a class C felony;
- (5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

**Sec. 11.41.520. Extortion.** (a) A person commits the crime of extortion if the person obtains the property of another by threatening or suggesting that either that person or another may

(1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or commit any other crime;

(2) accuse anyone of a crime;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;

(4) take or withhold action as a public servant or cause a public servant to take or withhold action;

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense; or

(7) inflict any other harm which would not benefit the person making the threat or suggestion.

(b) A threat or suggestion to perform any of the acts described in (a) of this section includes an offer to protect another from any harmful act when the offeror has no apparent means to provide the protection or when the price asked for rendering the protection service is grossly disproportionate to its cost to the offeror.

(c) It is a defense to a prosecution based on (a)(2), (3), or (4) of this section that the property obtained by threat of accusation, exposure, lawsuit, or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit, or other official action relates, or as compensation for property or lawful services.

(d) Extortion is a class B felony. (§ 3 ch 166 SLA 1978)

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**Sec. 11.41.530. Coercion.** (a) A person commits the crime of coercion if the person compels another to engage in conduct from which there is a legal right to abstain or abstain from conduct in which there is a legal right to engage, by means of instilling in the person who is compelled a fear that, if the demand is not complied with, the person who makes the demand or another may

(1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or commit any other crime;

(2) accuse anyone of a crime;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;

(4) take or withhold action as a public servant or cause a public servant to take or withhold action;

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense.

(b) It is a defense to a prosecution under (a)(2), (3), or (4) of this section that the defendant reasonably believed that the accusation or exposure was true or that the lawsuit or other invocation of official action was justified and that the defendant's sole intent was to compel or induce the victim to take reasonable action to correct the wrong that is the subject of the accusation, exposure, lawsuit, or invocation of official action or to refrain from committing an offense.

(c) Coercion is a class C felony. (§ 3 ch 166 SLA 1978)

**Sec. 12.55.125. Sentences of imprisonment for felonies.** (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.



(b) A defendant convicted of murder in the second degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five years;

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

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(3) if the offense is a second felony conviction, 10 years;

(4) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed

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or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced.

(g) If a defendant is sentenced under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section, except to the extent permitted under AS 12.55.155 — 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided.

(i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

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**Sec. 45.45.010. Legal rate of interest.** (a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

(b) Interest may not be charged by express agreement of the parties in a contract or loan commitment that is more than five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made. A contract or loan commitment in which the principal amount exceeds \$25,000 is exempt from the limitation of this subsection.

(c) *[Repealed, § 3 ch 84 SLA 1973.]*

(d) *[Repealed, § 2 ch 94 SLA 1981.]*

(e) *[Repealed, § 4 ch 146 SLA 1974.]*

(f) A bank, credit union, savings and loan institution, pension fund, insurance company or mortgage company may not require or accept



any percent of ownership or profits above its interest rate. This subsection does not apply to a loan if the principal amount of the loan is \$1,000,000 or more and the term of the loan is five years or more.

(g) Loan contracts and commitments covering one- to four-family dwellings may be prepaid without penalty, except federally insured loans that require a prepayment penalty.

(h) If the limitations on interest rates provided for in this section are inconsistent with the provisions of any other statute covering maximum interest, service charges or discount rates then the provisions of the other statute prevail. (§ 25-1-1 ACLA 1949; am § 20 ch 143 SLA 1968; am § 2 ch 69 SLA 1969; am §§ 1, 2 ch 94 SLA 1969; am §§ 1, 2 ch 239 SLA 1970; am §§ 1 — 3 ch 84 SLA 1973; am §§ 1 — 4 ch 146 SLA 1974; am § 1 ch 110 SLA 1976; am § 1 ch 159 SLA 1976; am § 2 ch 107 SLA 1980; am §§ 1, 2 ch 94 SLA 1981; am § 1 ch 56 SLA 1982)

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*Sec. 45.50.470. [Repealed, § 1 ch 246 SLA 1970.]*

**Sec. 45.50.471. Unlawful acts and practices.** (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

(b) The terms "unfair methods of competition" and "unfair or deceptive acts or practices" include, but are not limited to, the following acts:

(1) fraudulently conveying or transferring goods or services by representing them to be those of another;

(2) falsely representing or designating the geographic origin of goods or services;

(3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;

(4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

(5) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, secondhand, or seconds;

(6) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(7) disparaging the goods, services, or business of another by false or misleading representation of fact;

(8) advertising goods or services with intent not to sell them as advertised;

(9) advertising goods or services with intent not to supply reasonable expectable public demand, unless the advertisement prominently discloses a limitation of quantity;

(10) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods or services;

(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;

(13) failing to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting

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out the name and address of the seller and the name and address of the organization that the seller represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(14) representing that an agreement confers or involves rights, remedies or obligations which it does not confer or involve, or which are prohibited by law;

(15) knowingly making false or misleading statements concerning the need for parts, replacement, or repair service;

(16) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(17) basing a charge for repair in whole or in part on a guaranty or warranty rather than on the actual value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the guaranty or warranty, if any;

(18) disconnecting, turning back or resetting the odometer of a vehicle to reduce the number of miles indicated;

(19) using a chain referral sales plan by inducing or attempting to induce a consumer to enter into a contract by offering a rebate, discount, commission, or other consideration, contingent upon the happening of a future event, on the condition that the consumer either

sells, or gives information or assistance for the purpose of leading to a sale by the seller of the same or related goods;

(20) selling or offering to sell a right of participation in a chain distributor scheme;

(21) selling, falsely representing or advertising meat, fish or poultry which has been frozen as fresh food;

(22) failing to comply with AS 45.02.350;

(23) failing to comply with AS 45.45.130 — 45.45.240;

(24) counseling, consulting or arranging for future services relating to the disposition of a body upon death whereby certain personal property, not including cemetery lots and markers, will be furnished or the professional services of a funeral director or embalmer will be furnished, unless the person receiving money or property deposits the money or property, and money or property is received, within five days of its receipt, in a trust in a financial institution whose deposits are insured by an instrumentality of the federal government designating the institution as the trustee as a separate trust in the name only of the person on whose behalf the arrangements are made with a provision that the money or property may only be applied to the purchase of designated merchandise or services and should the money or property deposited and any accrued interest not be used for the purposes intended on the death of the person on whose behalf the arrangements are made, all money or property in the trust shall become part of that person's estate; upon demand by the person on whose behalf the arrangements are made, all money or property in the trust including accrued interest, shall be paid to that person; this paragraph does not prohibit the charging of a separate fee for consultation, counseling or arrangement services if the fee is disclosed to the person making the arrangement; any arrangement under this paragraph which would constitute a contract of insurance under AS 21 is subject to the provisions of AS 21;

(25) failing to comply with the terms of the Alaska Gasoline Products Leasing Act (AS 45.50.800 — 45.50.850);

(26) failing to comply with AS 45.30 relating to mobile home warranties and mobile home parks;

(27) failing to comply with AS 14.48.060(b)(13);

(28) dealing in hearing aids and failing to comply with AS 08.55.

(c) The unlawful acts and practices listed in (b) of this section are in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.

(d) *[Repealed, § 21 ch 166 SLA 1978.]* (§ 2 ch 246 SLA 1970; am § 1 ch 53 SLA 1974; am § 1 ch 138 SLA 1974; am § 1 ch 183 SLA 1975; am § 2 ch 146 SLA 1976; am § 3 ch 197 SLA 1976; am § 3 ch 234 SLA 1976; am § 21 ch 166 SLA 1978; am § 5 ch 15 SLA 1986; am § 5 ch 64 SLA 1986; am § 12 ch 131 SLA 1986)

**Sec. 45.50.481. Exemptions.** Nothing in AS 45.50.471 — 45.50.561 applies to

(1) an act or transaction regulated under laws administered by the state, by a regulatory board or commission except as provided by AS 45.50.471(b)(27), or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471;

(2) an act done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement or did not have a direct financial interest in the sale or distribution of the advertised product or service;

(3) an act or transaction regulated under AS 21.36 or AS 06.05 or a regulation adopted under the authority of those chapters. (§ 2 ch 246 SLA 1970; am §§ 2, 3 ch 53 SLA 1974; am § 6 ch 64 SLA 1986)

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**Sec. 45.50.531. Private and class actions.** (a) A person who purchases or leases goods or services and thereby suffers an ascertainable loss of money or property, real or personal, as a result of another person's act or practice declared unlawful by AS 45.50.471, may bring a civil action in the judicial district in which the seller or lessor resides or has the principal place of business or is doing business, to recover actual damages or \$200, whichever is greater. The jury or, if the action is tried without a jury, the judge may, in cases of wilful violation, award up to three times the actual damages sustained, and in all cases the court may provide equitable relief it considers necessary or proper.

(b) A person entitled to bring an action under this section may, after investigation by and approval of the attorney general, if the unlawful act or practice has caused similar injury to numerous other persons similarly situated and if the person adequately represents the similarly situated persons, bring an action on behalf of the person and other similarly injured and situated persons to recover actual damages. A person planning to bring an action under this subsection shall first submit to the attorney general a copy of the proposed complaint, and the person may not file the complaint in court without the attorney general's approval. In an action brought under this subsection, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.



(c) Upon commencement of an action brought under this section the clerk of the court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of an order or judgment in the action, shall mail a copy of the order or judgment to the attorney general.

(d) In an action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees and costs.

(e) A permanent injunction or final judgment against a person against whom an action was initiated under AS 45.50.501 is prima facie evidence in an action brought under this section that the person used or employed an act or practice declared unlawful by AS 45.50.471.

(f) A person may not commence an action under this section more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by AS 45.50.471.

(g) If the court finds for the defendant in an action brought under this section, it may award the defendant an amount equal to the actual costs and attorney fees the defendant incurred in the defense.

(h) Manufacturers or suppliers of merchandise, the fault of which is the basis for the action under this chapter, are liable for the damages assessed to or suffered by retailers charged under this chapter. (§ 2 ch 246 SLA 1970; am § 1 ch 225 SLA 1976)

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**Sec. 45.50.542. Waiver.** A waiver by a consumer of the provisions of AS 45.50.471 — 45.50.561 is contrary to public policy and is unenforceable and void. (§ 7 ch 53 SLA 1974)

**Sec. 45.50.545. Interpretation.** In interpreting AS 45.50.471 due consideration and great weight should be given the interpretations of 15 U.S.C. 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act).

**Sec. 45.50.551. Penalties.** (a) A person who violates the terms of an injunction or restraining order issued under AS 45.50.501 shall forfeit and pay to the state a civil penalty of not more than \$25,000 per violation. For the purposes of this section, the superior court in a judicial district issuing an injunction retains jurisdiction, and the cause shall be continued, and in these cases the attorney general acting in the name of the state may petition for recovery of the penalties.

(b) In an action brought under AS 45.50.501, if the court finds that a person is using or has used an act or practice declared unlawful by

AS 45.50.471, the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than \$5,000 per violation.

(c) *[Repealed, § 21 ch 166 SLA 1978.]* (§ 2 ch 246 SLA 1970; am § 9 ch 53 SLA 1974; am § 21 ch 166 SLA 1978)

**Sec. 45.50.561. Definitions.** In AS 45.50.471 — 45.50.561

(1) "advertising" includes the attempt directly or indirectly by publication, dissemination, solicitation, endorsement or circulation, display in any manner, including solicitation or dissemination by mail, telephone or door-to-door contacts, or in any other way, to induce directly or indirectly a person to enter or not enter into an obligation or acquire title or interest in any merchandise or to increase the consumption of it or to make a loan;

(2) "cemetery lot" means a lot, plot, space, grave, niche, mausoleum, crypt, vault or columbarium, used or intended to be used for the interment of human remains;

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(3) "chain distributor scheme" means a sales device whereby a person, upon condition that the person make an investment, is granted a license or right to solicit or recruit for profit one or more additional persons who are also granted a license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted a license or right upon the condition of investment; a limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility for the license or right to solicit or recruit or the receipt of profit from these does not change the identity of the scheme as a chain distributor scheme; as used in this paragraph, "investment" means acquisition, for a consideration other than personal services, of tangible or intangible property, and includes but is not limited to franchises, business opportunities and services; "investment" does not include sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(4) "consumer" means a person who seeks or acquires goods or services by lease or purchase;

(5) "dealing in hearing aids" has the meaning given in AS 08.55.200;

(6) "documentary material" means the original or a copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible docu-

ment or recording, wherever situate;

(7) "examination" of documentary material includes the inspection, study, or copying of the material, and the taking of testimony under oath or acknowledgment in respect of documentary material or copy of it;

(8) "fresh" means a condition of food which has never been frozen;

(9) "hearing aid" has the meaning given in AS 08.55.200;

(10) "knowingly" means actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness;

(11) "seconds" means manufactured items having flaws or consisting of a standard quantity or quality less than the manufacturer's quality standard. (§ 2 ch 246 SLA 1970; am § 10 ch 53 SLA 1974; am § 2 ch 138 SLA 1974; am § 13 ch 107 SLA 1984; am § 13 ch 131 SLA 1986)

**Sec. 45.50.562. Combinations in restraint of trade unlawful.** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is unlawful. (§ 1 ch 53 SLA 1975)

**Sec. 45.50.564. Monopolies and attempted monopolies unlawful.** It is unlawful for a person to monopolize, or attempt to monopolize, or combine or conspire with another person to monopolize any part of trade or commerce. (§ 1 ch 53 SLA 1975)

**Sec. 45.50.566. Transactions and agreements not to use or deal in commodities or services unlawful.** It is unlawful for a person to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged for it, or discount from, or rebate upon, that price, on the condition, agreement, or understanding that the lessee or purchaser will not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service of a competitor or competitors of the lessor or seller, if the effect of the lease, sale or contract for sale, or of the condition, agreement, or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce. (§ 1 ch 53 SLA 1975)



**Sec. 45.50.572. Exemptions.** (a) AS 45.50.562 — 45.50.596 do not forbid the existence or operation of labor, agricultural or horticultural organizations created for the purpose of mutual help, and not conducted for profit, or forbid or restrain members of those organizations from lawfully carrying out the legitimate objectives of them; nor are these organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of AS 45.50.562 — 45.50.596.

(b) AS 45.50.562 — 45.50.596 do not forbid actions or arrangements authorized or regulated under the laws of the United States which exempt these actions or arrangements from application of the anti-

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trust laws of the United States or under the following statutes of this state:

(1) AS 06.05.235;

(2) AS 10.15; and

(3) AS 31.05.110.

(c) AS 45.50.562 — 45.50.596 do not forbid persons engaged in the fishing industry as fishermen, catching or collecting aquatic products, from acting together in associations for the purpose of catching, collecting, or preparing for market their product.

(d) AS 45.50.562 — 45.50.596 do not apply to public utilities which have been issued a certificate of public convenience and necessity under AS 42.05.

(e) *[Repealed, § 68 ch 21 SLA 1985.]*

(f) *[Repealed, § 10 ch 75 SLA 1982.]*

(g) AS 45.50.562 — 45.50.596 do not forbid activities expressly required by a regulatory agency of the state. Activities permitted by a regulatory agency of the state are not forbidden by this chapter if the regulatory agency has given due consideration to the possible anti-competitive effects before permitting the activities, and enforcement of the provisions of AS 45.50.562 — 45.50.596 would be disruptive of the regulatory scheme.

(h) AS 45.50.562 — 45.50.596 do not forbid actions or arrangements necessary to carry out the provisions of the Alaska Native Claims Settlement Act. (§ 1 ch 53 SLA 1975; am § 10 ch 75 SLA 1982; am § 68 ch 21 SLA 1985)

**Revisor's notes.** — Formerly AS 45.52.060. Renumbered in 1980.

**Effect of amendments.** — The 1982 amendment repealed subsection (f), which read "AS 45.50.562 — 45.50.596 do not apply to banks and financial institutions regulated under AS 06."

The 1985 amendment repealed subsection (e), concerning the inapplicability of AS 45.50.562 — 45.50.596 to certain carriers and ferries.

**Sec. 45.50.574. Contracts voidable.** A contract or agreement in violation of a provision of AS 45.50.562 — 45.50.596 is voidable by either party as to future performance by either party; however, the court may, in its discretion, order payment for goods or services already received to prevent unjust enrichment. (§ 1 ch 53 SLA 1975)

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**Sec. 45.50.576. Suits by persons injured.** (a) A person who is injured in business or property by a violation of AS 45.50.562 — 45.50.570, or a person so injured because the person refuses to accede to a proposal for an arrangement that, if consummated, would be a violation of AS 45.50.562 — 45.50.570, may bring a civil action

(1) for damages sustained by the person, and if the judgment is for the plaintiff and the trier of fact finds that the defendant's conduct was wilful, the plaintiff shall be awarded threefold the amount of damages sustained by the person, plus the costs of the suit, including reasonable attorney fees; and

(2) to enjoin the unlawful practice, and if judgment is for the plaintiff, the plaintiff may be awarded the costs of the suit, including reasonable attorney fees.

(b) When the state, a home rule or general law city or borough or other governmental entity is injured by reason of a violation of AS 45.50.562 — 45.50.570, it may maintain an action in the same manner as prescribed in (a) of this section for an injured person; and the state, city, borough, or other governmental entity is entitled to the same relief as provided in (a) of this section. (§ 1 ch 53 SLA 1975)

**Revisor's notes.** — Formerly AS 45.52.110. Renumbered in 1980.

**Sec. 45.50.578. Certain violations constitute misdemeanor.** A person who violates AS 45.50.562 or 45.50.564 is guilty of a misdemeanor and upon conviction is punishable, if a natural person, by a fine of not more than \$20,000, or by imprisonment for not more than one year, or by both; and if not a natural person, by a fine of not more than \$50,000. (§ 1 ch 53 SLA 1975)

**Sec. 45.50.582. Jurisdiction of court.** An action arising under AS 45.50.562 — 45.50.596 shall be brought in the superior court. (§ 1 ch 53 SLA 1975)

**Sec. 45.50.588. Limitation of actions.** An action to enforce a claim arising under AS 45.50.562 — 45.50.596 is barred unless commenced within four years after the claim accrues, except that when an action is brought by the attorney general under AS 45.50.562 — 45.50.596, the running of this period of limitation, with respect to every private right of action for damages which is based in whole or in part on a matter complained of in the action by the attorney general, shall be suspended during the pendency of the action brought by the attorney general. For the purpose of this section, a claim for a continuing violation is considered to accrue at any time during the period of the violation. (§ 1 ch 53 SLA 1975)

**Sec. 45.50.596. Definitions.** In AS 45.50.562 — 45.50.596

(1) "asset" includes any property, tangible or intangible, real, personal, or mixed and wherever located, and any other thing of value;

(2) "documentary evidence" includes an original or copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical tabulation, magnetic tape, or other computer data storage system, or other tangible document or recording;

(3) "trade" and "commerce" include but are not limited to, trade in goods, merchandise, natural resources, whether or not severed, extracted, harvested or produced, agricultural products, produce, choses in action, commodities, and any other article of commerce; they include trade or business in service trades, transportation, banking, lending, advertising, bonding and any other business whether or not that business furnishes a personal service. (§ 1 ch 53 SLA 1975)

**Revisor's notes.** — Formerly AS 45.52.300. Renumbered in 1980.

## **Rule 15. Amended and Supplemental Pleadings.**

(a) **AMENDMENTS.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **AMENDMENTS TO CONFORM TO THE EVIDENCE.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) **RELATION BACK OF AMENDMENTS.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing

the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided

by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) **SUPPLEMENTAL PLEADINGS.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

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#### **Rule 41. Dismissal of Actions.**

##### **(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.**

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who



has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **INVOLUNTARY DISMISSAL: EFFECT THEREOF.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and

render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and a voluntary dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) **DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **COSTS OF PREVIOUSLY-DISMISSED ACTION.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

**Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.**

(a) **MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court



may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

**(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted,

the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

**(d) SAME: DENIAL OF MOTION.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

### **Rule 56. Summary Judgment.**

(a) **FOR CLAIMANT.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **FOR DEFENDING PARTY.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **CASE NOT FULLY ADJUDICATED ON MOTION.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so

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specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **WHEN AFFIDAVITS ARE UNAVAILABLE.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **AFFIDAVITS MADE IN BAD FAITH.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**RULE 5**  
**MOTIONS AND OTHER MATTERS**

(A) Motions, etc., to be Served on Opposing Party. All motions, objections, orders to show cause, petitions, applications, and every other such matter shall be served upon all parties, or, after any party has appeared by counsel, upon counsel for such party.

**(B) Requirements for Submission.**

(1) There shall be served and filed as a part of the motion or other application:

(a) Legible copies of all documentary evidence which the moving party intends to submit in support of the motion or other application. When a motion is supported by affidavit, the affidavit shall be served with the motion unless otherwise ordered by the Court; and

(b) A clear, concise, complete and candid written statement of the reasons in support thereof, together with an adequate brief of the points and authorities upon which the moving party relies.

(2) Each party opposing a motion or other application shall, within fifteen (15) days of service of the motion or other application upon that party:

(a) Serve and file legible copies of all documentary evidence upon which the party intends to rely; and

(b) Serve and file a clear, concise, complete and candid written statement of the reasons in opposition thereto and an adequate opposing brief of points and authorities; or

(c) Serve and file a written statement of non-opposition to said motion.

The above will not be necessary if otherwise ordered by the Court or if otherwise stipulated in writing by the parties, such stipulation subject to the approval of the Court.

(3) If desired, the moving party within five (5) days after the service upon that party of the points and authorities of the adverse party, may serve and file a reply brief.

(4) Failure to file briefs within the time prescribed (or within any extension of time granted by order of the Court) shall subject such motions to summary ruling by the Court sua sponte. Failure to file a brief by the moving party shall be

deemed an admission that, in the opinion of counsel, the motion is without merit. Failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

**(C) Oral Argument.**

(1) A written request for oral argument filed by counsel within three (3) days of the date of filing the final brief will constitute a certificate that oral argument is necessary. When request has been filed by one party, the right to oral argument, if granted, will extend to all parties. However, the Court, to expedite its business, may order the submission and determination of motions without oral hearing.

(2) When oral argument has been requested or granted by the Court and all briefs required by this rule have been filed with the Clerk, the Court, upon finding that oral argument is necessary, will schedule a hearing and notice all parties at least ten (10) days in advance of such hearing, or upon shorter notice as special or unusual circumstances may require.

(3) When oral argument is heard by the Court, counsel are required to present a meaningful and candid discussion and to avoid reading or restating material appearing in the briefs, records, or authorities. (Added, eff. 7-30-85)

**(D) Motions Submitted.** Unless one of the parties files a written request that oral argument be heard, a motion is deemed submitted for the Court's consideration when all briefs required by this rule have been filed with the Clerk, or the time for filing such briefs has passed. (Added, eff. 7-30-85)

**(E) Discovery Motions.**

(1) If the matter arises under the Federal Rules of Civil Procedure, Depositions and Discovery, Rules 26 through 37, inclusive, and if the matter is opposed, counsel shall prepare, serve and file a certificate that they have conferred with respect to the pending matter and enumerate therein the matters remaining for determination by the Court.

(a) The Court will not consider a motion, objection, order to show cause, petition or other similar matter arising under these cited rules until such certificate of compliance is filed.

(b) Counsel for the moving party shall arrange for such conferences.



(c) Should opposing counsel fail or refuse to confer with counsel for the moving party when requested to do so, this fact shall be reported promptly in writing to the Court.

(2) If the motion or other matter subsequently is heard and the Court finds the same (or the opposition thereto) to be without substantial justification, or that counsel for any party refused to meet and confer, or having met, refused or failed to confer in good faith, the Court may assess costs, including attorney's fees, if appropriate, against the offending party. (Added, eff. 7-30-85)

**(F) Motions for Summary Judgment.**

(1) A motion for summary judgment may be accompanied by affidavits setting forth concise statements of material facts made upon personal knowledge in support of the motion. With each such motion a brief must be served and filed asserting that the moving party is entitled to judgment as a matter of law.

(2) Any party opposing the motion shall simultaneously serve and file with the brief in opposition a "statement of genuine issues" setting forth clearly, concisely, completely and candidly those contested material facts which must be tried.

(3) Any party moving for summary judgment or opposing such motion shall comply with the provisions of paragraph (B) of this rule. (Amended, eff. 7-30-85)

**(G) Motion for Shortened Time.** The moving party may apply to the Court for an order shortening time, and serve such motion for shortened time upon all other parties to the action. The motion shall be accompanied by an affidavit which sets forth facts justifying shortened time. (Amended, eff. 7-30-85)

**(H) Frivolous and Unnecessary Motions; Penalty.** The presentation to the Court of frivolous or unnecessary motions or opposition to motions which, in the judgment of the Court, unduly delay the progress of the action or proceedings, or the filing of any motion to dismiss or motion to strike for the purpose of delay where no reasonable ground appears therefor, subjects counsel presenting or filing such to imposition of costs and attorney's fees. (Amended, eff. 7-30-85)

**(I) Interlocutory Applications; Evidence.** Upon the hearing of any application for an interlocutory or injunctive order, the facts shall be presented by affidavit or other documentary evidence; unless the Court upon application or upon its own

motion permits oral evidence to be introduced. (Amended, eff. 7-30-85)

**(J) Motion for Rehearing or Reconsideration.**

(1) A motion for rehearing or reconsideration shall be filed within ten (10) days of service of the order or ruling upon which rehearing or reconsideration is being requested.

(2) Any party moving for rehearing or reconsideration or opposing such motion shall comply with the provisions of paragraph (B) of this rule. (Added, eff. 9-14-83; amended eff. 7-30-85)



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Arizona District Court Local Rule  
11(h)(now Rule 11(i)) (Source: Jacobson v.  
Filler, 790 F.2d 1362,1363-1364 (9th  
Cir.1986).) In Part:

" Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific portion of the record where the fact may be found (i.e. affidavit, deposition, etc.) Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts, which the opposing party asserts, including those facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party."

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9th Circuit Court of Appeals Rules  
Circuit Rule 35-1. Suggestion of  
Appropriateness of Rehearing En Banc.

Where a suggestion of the appropriateness of a rehearing en banc is made pursuant to FRAP 35(b) as a part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion.

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such a conflict is an appropriate ground for suggesting a rehearing en banc.

Circuit Advisory Committee Note to  
Circuit Rules 34-1 through 34-4 (in part)

" FRAP 34 and Circuit Rules 34-1 through 34-4 should be read in the context

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of the court's procedures which are set forth in this note. . . .

The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the burden among them. The clerk does not know what cases will ultimately be allocated to each of the panels. . . .

The only exception to the rule of random assignment of cases to panels is that a case heard by the court on a prior appeal may set before the same panel upon a later appeal. . . .



**§ 465. Disqualification of justice, judge, or magistrate**

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding;

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

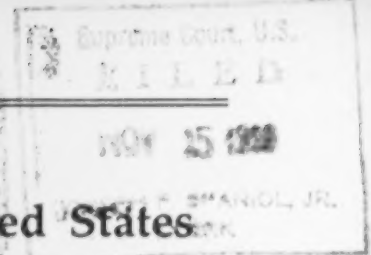
(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1809; Nov. 6, 1978, Pub.L. 95-598, Title II, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1007, 102 Stat. 4867.)



In The  
**Supreme Court of the United States**

October Term, 1990

MICHAEL E. PLUNKETT,

*Petitioner,*

LANE, KNORR & PLUNKETT, Architects and  
Planners; LANE, KNORR & PLUNKETT,  
Investment Company, a/k/a LKP Investment Company,

*Plaintiff,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
Receiver of First Interstate Bank of Alaska,  
FIRST INTERSTATE BANK CORPORATION;  
FIRST INTERSTATE BANK OF OREGON,

*Respondents.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS  
FIRST INTERSTATE BANK CORPORATION AND  
FIRST INTERSTATE BANK OF OREGON

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First Interstate Bank Corporation and  
First Interstate Bank of Oregon*





## QUESTIONS PRESENTED

1. Was petitioner denied due process of law or equal protection because he was not affirmatively advised by the district court of the level of proof he would be required to submit in order to successfully oppose a motion for summary judgment?

2. Did the Circuit Court of Appeals err in affirming a summary judgment dismissal of petitioner's claims?

## LIST OF PARTIES

1. *Michael E. Plunkett*. Petitioner Michael E. Plunkett is an architect who formerly lived in Anchorage, Alaska, and borrowed money from the Alaska Bank of Commerce.

2. *Alaska Bank of Commerce/First Interstate Bank of Alaska*. Alaska Bank of Commerce is the bank which made the loans which are the basis of petitioner's claims. In 1983, over a year after the last of the two loans was made to petitioner, Alaska Bank of Commerce entered into a franchise agreement with First Interstate Bancorp which permitted the Alaska Bank to use the name "First Interstate Bank of Alaska", to participate in the automatic teller system operated by First Interstate Bancorp, and to have access to certain operational services provided by the Bancorp. There was no parent/subsidiary relationship between the entities, and First Interstate Bancorp did not have an equity interest in First Interstate Bank of Alaska. (R. 88, ¶¶1, 2). Subsequent to the events at issue herein, First Interstate Bank of Alaska's operations were taken over in receivership by the Federal Deposit Insurance Corporation.

3. *First Interstate Bank of Oregon*, formerly First National Bank of Oregon, is a wholly-owned subsidiary of First Interstate Bancorp. Its subsidiaries are Equity Holding Company Limited, First Interstate Development Corp. and First Interstate Insurance Agency of Oregon, N.A.

4. *First Interstate Bancorp*,<sup>1</sup> respondent, is a bank holding company and is the parent corporation of First

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<sup>1</sup> Erroneously denominated "First Interstate Bank Corporation" in petitioner's complaint.

### LIST OF PARTIES – continued

Interstate Bank of Oregon, formerly known as First National Bank of Oregon. (R. 87 ¶1). Other subsidiaries, and second-tier subsidiaries, are as follows:

- First Interstate Bank of Arizona, N.A.
- First Interstate Insurance Company of Arizona
- First Interstate Equity Corporation
- TNR&S Acquisition, Inc.
- First Interstate Bank of California
- First Interstate Bank International
- United California Bank Realty Corporation
- First Interstate Tower
- UCB Leasing Corporation
- First Interstate Overseas Investment, Inc.
- First Interstate Asia, Ltd.
- First Interstate Bank of Canada
- First Interstate Administracao E Servicos, Ltd.
- First Interstate & LCF Edmond De Rothschild-Gestion, S.A.
- First Interstate International Trust Co. Ltd.
- GFI Realty Co.
- First Interstate Mortgage Company
- First Interstate Southwest Corporation
- Alex Brown Development
- Meridian Mortgage Services
- Pacific Equity Finance, Ltd.
- Western Fruit S.A.
- Western Agricola Limitada
- Atlantic Produce Ltd.
- Winter Fruit Distributors, Inc.

# **LIST OF PARTIES – continued**

EZG Limited Partnership

First Interstate Bank of Englewood

First Interstate Bank of Fort Collins, N.A.

First Colorado Agricultural Credit Corporation

First Interstate Bank of Idaho, N.A.

First Interstate Bank of Nevada, N.A.

Hughes Parkway Associates

First Interstate Bank of Nevada Foundation

First Interstate Bank of Albuquerque

First Interstate Bank of Lea County

First Interstate Bank of Roswell

First Interstate Bank of Santa Fe, N.A.

First Interstate Bank of Utah, N.A.

First Interstate Insurance Agency of Utah,  
Inc.

— First Interstate Bank of Washington, N.A.

TACSEA, Inc.

Evergreen Marine Leasing, Inc.

First Interstate Real Estate Services Com-  
pany, Inc.

First Interstate Investment Services of  
Washington, Inc.

First Interstate Insurance Agency of Wash-  
ington, Inc.

First Interstate Electronic Services Corporation  
Lake Spokane Water Company

First Interstate Bank of Casper, N.A.

First Interstate Bank of Laramie, N.A.

First Interstate Bank of Riverton, N.A.

First Interstate Franchise Services, Inc.

First Interstate Bank of Oklahoma, N.A.

Consolidated Asset Management Company

First Interstate Foundation

First Investment Management Company

Bank Marketing Systems, Inc.

## LIST OF PARTIES - continued

First Interstate Central Bank  
 First Interstate Bancorp of Texas, Inc.  
     First Interstate Bank of Jacksonville  
     First Interstate Bank of Texas, N.A.  
         First Interstate Capital Corp of Texas  
         First Interstate Capital Company of Texas  
         Idlewilde Company  
         Regency Utility Company  
         First Interstate Mortgage Company of the Southwest  
     First Interstate Life Insurance Co. of Texas  
     First Interstate Agency, Inc.  
     First Interstate Foundation of Texas  
     First Interstate Texas Leadership Funds/State  
     First Interstate Texas Leadership Funds/Federal  
     First Interstate Brokerage of Texas, Inc.  
     Lakewood La Vista Company  
     First Interstate Trust Co.  
 ISMA, Inc.  
     First Interstate Mortgage Company of Colorado  
     1580 Logan Corporation  
     First Interstate Structures, Inc.  
     AJI Mortgage, Inc.  
     DJS Mortgage Inc.  
     First Interstate Commercial Corporation  
     Hotel Vernal Corporation  
     Cland 111 Corp.  
     1199 NASA Corp.  
     Terrander II Corp.  
     Postwood Plaza, Inc.  
     First Energy Properties of Texas, Inc.  
     Rivland Holding Corp.

# LIST OF PARTIES - continued

First Interstate Asset Evaluation Services, Inc.  
 Cland I Corp.  
 Cland II Corp.  
 CMC Title Holding Corp.  
 Fimcopartners of Dallas, Inc.  
 FIMCO Partners of Denver, Inc.  
 Galvecurt Corp.  
 KATY Corporation  
 Kencherry Corp.  
 Richmond I Corp.  
 Wyoming Mine Corp.  
 First Interstate Overseas N.V.  
 First Interstate Bancard Company, N.A.  
     First Interstate Bancard Company  
 First Interstate Venture Capital Corporation  
     First Interstate Capital, Inc.  
     First Interstate Equities Corporation  
     First Interstate Resource Finance Associates  
 First Interstate International Finance Limited  
 First Interstate Trading Company  
 First Interstate Mortgage Company of Illinois  
     Republic Realty Mortgage Corporation  
 First Interstate Results, Inc.  
 First Interstate Bank, Ltd.  
     First Interstate Trust Company of New York  
         First Interstate Investment Services, Inc.  
         First Interstate Portfolio Lending Services,  
         Inc.  
 FIL Holding Company  
     First Interstate Holding (UK) Limited  
         First Interstate Service Company  
         (U.K.) Limited  
         First Interstate Servicios Financieros,  
         S.A./6th Gen Sub/FICM Ltd/104

**LIST OF PARTIES – continued**

First Interstate Capital Markets,  
 Ltd.  
 First Interstate Capital Markets  
 Euroasia Limited/6th Gen  
 First Interstate Capital Markets  
 Euroasia (H.K.) Limited/7th Gen  
 Sub/105  
 First Interstate Nominees (HK)  
 Limited  
 First Interstate Securities Limited  
 Highwalk Nominees Limited/  
 FICM Ltd./104/6th Gen. Sub  
 First Interstate Futures Corporation  
 First Interstate Public Finance Company  
 K.F.I. Developers, Inc.  
 Camarillo Commerce Center Joint Ven-  
 ture  
 First Interstate Financial Services, Inc. D/B/A  
 Nova Financial Services  
 Nova Finance Services, Inc. Honolulu,  
 Hawaii  
 First Interstate Bank of Alaska, N.A.  
 First Interstate Bancorp of Colorado  
 First Interstate Bank of Denver, N.A.  
 Denver Investment Advisors, Inc.  
 First Energy Properties, Inc.  
 Aspen Bancorp, Inc.  
 First Interstate Switch, Inc.  
 First Denver Asset Trust, Inc.  
 Farmers State Bank of Yuma  
 First Interstate Bank of Montana, N.A.



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In The  
**Supreme Court of the United States**  
October Term, 1990

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MICHAEL E. PLUNKETT,

*Petitioner,*

LANE, KNORR & PLUNKETT, Architects and  
Planners; LANE, KNORR & PLUNKETT,  
Investment Company, a/k/a LKP Investment Company,

*Plaintiff,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
Receiver of First Interstate Bank of Alaska,  
FIRST INTERSTATE BANK CORPORATION;  
FIRST INTERSTATE BANK OF OREGON,

*Respondents.*

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On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS  
FIRST INTERSTATE BANK CORPORATION AND  
FIRST INTERSTATE BANK OF OREGON

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents First Interstate Bancorp and First Interstate Bank of Oregon respectfully request that this Court

deny the petition for writ of certiorari, which seeks review of Opinion No. 89-35500 of the United States Court of Appeals for the Ninth Circuit, filed May 16, 1990, which upheld the Final Judgment dated June 16, 1989 of the United States District Court for the District of Alaska.

Petitioner brought a petition for rehearing and suggestion for rehearing en banc, which was denied and rejected by the Court of Appeals by order dated July 18, 1990, from which petitioner brought his petition for writ of certiorari to this Court based upon 28 U.S.C. §1254(1).

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### CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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### STATEMENT OF THE CASE

#### I. STATEMENT OF FACTS

Petitioner's claims arise from two loans made in Alaska to petitioner and his partnership by the Alaska



Bank of Commerce in 1981 and 1982. The first loan, in the amount of \$1.667 million, was evidenced by a standardized Alaska Bank of Commerce note stating that it bore interest in an amount "not less than the prime rate plus \_\_\_ percent", with the prime rate defined as "... the prime rate being charged by the \_\_\_\_\_ to its most credit-worthy borrowers during the term of this note." (App. J-4-5.)<sup>1</sup> For this loan, the blanks were filled in to provide for a 3.5% increase above the prime rate, and "FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON" was inserted as the bank whose prime rate was referenced in the note. The second note, on a different standardized form, was executed on February 11, 1982, with blanks filled in to provide for interest at the rate of 3.5% "over Prime Floating of FIBO". (App. J-5.)

Petitioner's primary contentions below were that (1) the prime rate of the First National Bank of Oregon, later known as the First Interstate Bank of Oregon ("FIBO"), was fixed in violation of the Sherman Act, 15 U.S.C. §1, which resulted in interest overcharges to him, and that (2) the announced prime rate of FIBO, which the Alaska Bank used as an index to price the loans to appellant, was in fact not its real "prime rate" because FIBO sometimes made loans, to special borrowers, below the published prime rate. Petitioner's factual allegations supporting these points also formed the basis for a number of separate claims for relief on theories of state and federal antitrust violations, fraud, RICO (18 U.S.C. §1961 *et seq.*) and breach of contract. Additionally, petitioner alleged a

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<sup>1</sup> This designation is to page numbers in the Appendix filed herewith.

variety of claims arising under Alaska law, including usury, defamation, bank code violations, consumer protection law violations, and general allegations of a conspiracy designed to deny him credit and ruin his business.

Petitioner's claims referenced and relied upon claims brought in the United States District Court for the District of Oregon in *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A.*, Civil Case No. 82-754, wherein other plaintiffs claimed that FIBO's adherence to a near universal prime rate constituted illegal price fixing, and that FIBO had misrepresented the "prime rate" in that it had sometimes advanced loans at below prime, to special borrowers. Subsequent to petitioner Plunkett's initial complaint herein, FIBO's actions were held, by the District Court of Oregon, not to violate the antitrust statutes, in *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A.*, 605 F.Supp. 592 (D.C. Or. 1985), which holding was sustained on appeal in *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987).

Petitioner had relied heavily upon the *Wilcox* facts to support his claims, and, in any case, was unable to offer evidence below to demonstrate any connection whatever between First Interstate Bancorp ("FIBC") or FIBO and the loans made by the Alaska Bank of Commerce to him or his company. The evidence was undisputed (1) that at the time the loans were made to petitioner there was no franchise agreement between FIBC and Alaska Bank of Commerce; (2) that neither FIBC nor FIBO had ever had any equity interest in Alaska Bank of Commerce; (3) that neither bank participated in nor had any knowledge of the loans to petitioner, or any other dealings with him; (4)

that FIBC acquired no interest in the loans by virtue of its subsequent franchise agreement with First Interstate Bank of Alaska (formerly Alaska Bank of Commerce); (5) that FIBO neither specifically authorized nor was aware of the fact that the loans to appellant had been tied to the prime rate of First National Bank of Oregon or FIBO, except for general knowledge that such was a common banking practice; and (6) that FIBO had never held out to petitioner, or to the public generally, that the announced "prime rate" was the lowest rate available to any borrower under any circumstances, and that the term "prime rate" does not carry with it such a connotation. (See, generally, App. F, G, H, K.)

The only evidence offered by petitioner to support any nexus between FIBC or FIBO and the loans made by the Alaska Bank of Commerce, or of any conspiracy between such banks, was as follows:

A. *The Alaska Bank of Commerce had referenced FIBO's prime rate in the loans to petitioner.* However, it was undisputed that neither FIBC nor FIBO had participated in the loans, or gained any interest in them at any stage. The Alaska bank unilaterally referenced the Oregon bank's prime rate as an index for the loans it made to petitioner, without direct or specific knowledge of the Oregon bank, and was a common banking practice. (App. G-2-3; App. J-3.) The Alaska bank normally referenced the Oregon bank's prime rate, in case the Oregon bank were to participate in interim commercial financing loans, which it frequently did, but did not do on this loan. (App. J-3; App. G-2-3; App. H-3.)

B. *FIBO had a correspondent bank arrangement with the Alaska Bank of Commerce. This meant only that the Alaska bank had a short-term line of credit with FIBO, which permitted it to borrow on an overnight basis at the federal fund rate (no relationship to the "prime rate" on long-term loans) to meet immediate liquidity problems. This is a common relationship in the banking industry; FIBO corresponds with 39 different non-affiliated banks. (App. K-2-3.)*

C. *The Alaska Bank of Commerce entered into a franchise agreement with FIBC, and changed its name to First Interstate Bank of Alaska. This occurred in 1983, almost three years after petitioner's loan agreement with the Alaska bank and over a year after the last of the two loans was made. The franchise arrangement did not result in FIBC obtaining either any equity interest in the Alaska bank or any control of the lending activities of the Alaska bank or its employees. (App. H-2-3.) Petitioner's only evidence of any control was his assertion that, at the time the franchise agreement was executed in 1983, an FIBC representative advised the Alaska bank on the layout, signage, and other features FIBC desired at the bank. (App. I-7.)*

D. *FIBC employed an individual named Kenneth K. Kaufmann, and the First Interstate Bank of Alaska had employed an individual named Frank Kaufmann. These gentlemen are not related and not acquainted with one another. (App. L-2.)*

E. *An individual named Robert McWhorter, who had previously worked for the FIBO branch in Eugene, Oregon, subsequently worked for the Alaska bank which had made the*

loans to petitioner. However, the record shows that McWhorter had been fired by FIBO and had engaged in acrimonious litigation with that bank for several years, before he went to work for the Alaska bank. (App. M-2-16.)

F. *Petitioner claims he made several telephone calls to FIBO to verify the correctness of the rate of interest being charged to him by the Alaska bank, and was advised by FIBO of its current prime rate. The bank does not deny that it regularly responds to such inquiries from the public.*

G. *At the time of pending foreclosure on the Alaska Bank of Commerce loans, petitioner attempted to obtain credit from other Alaskan banks, but was denied. Petitioner offered no evidence of any communication between FIBC or FIBO and such banks, and FIBC and FIBO both deny any knowledge of petitioner or of his efforts to obtain credit, prior to the time he filed his suit in 1984. (App. G-3-4; App. H-4-5.)*

## II. STATEMENT OF PROCEEDINGS

Petitioner filed this action *pro se* in 1984, and amended his complaint in December, 1987. Defendants FIBC and FIBO brought a motion for summary judgment on March 31, 1988. Four months after opposition and reply memoranda had been filed, the District Court held a status conference, at which time petitioner was provided with additional time to pursue "such discovery as he deems necessary for purposes of the defendants' summary judgment motion", and was granted leave to file a supplemental opposition following such discovery. (App.

D-1-2.) Thereafter, petitioner pursued no further discovery from either FIBC or FIBO; he did pursue discovery from FDIC; and he filed no additional opposition memoranda to respondents' pending motion for summary judgment.

After hearing, the District Court entered summary judgment on May 15, 1989 (App. B-1) and final judgment on June 16, 1989 (App. C.) On the price fixing claim, the District Court held that *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987), which addressed the identical banking practices of FIBO which were the subject of petitioner's allegations, was dispositive that the Bank's method of establishing its prime rate did not constitute illegal price fixing, unless petitioner could supply the Court with any additional facts which would evidence any suppression of competition or show any sinister domination. (App. B-4.) The Court held that petitioner had not sustained his burden of coming forward with sufficient evidence to withstand a summary judgment motion, under the standards set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). (App. B-3-6.) Additionally, the District Court held that the evidence proffered by plaintiff failed to meet his burden to produce evidence that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that FIBC and FIBO had acted independently of the alleged co-conspirators, and thus lawfully. (App. B-5.) The Court held that petitioner's remaining claims for relief all hinged on the allegation of conspiracy, and that petitioner had failed to make any showing whatever



that FIBC or FIBO conspired with any other person or entity in a way relating to plaintiff's loans. (App. B-7.)

Petitioner appealed to the Ninth Circuit Court of Appeals, supplementing his previous arguments with the contention that *Celotex*, *Anderson*, and *Matsushita* set forth a new summary judgment standard and that he, as a *pro se* civil litigant, was entitled to prior notice of this standard by the District Court, prior to the entry of summary judgment dismissing his claims. Additionally, petitioner argued that his pendent state claims should not have been dismissed with prejudice, but rather left open for resolution by state courts.

The Court of Appeals affirmed the dismissal of all claims by Memorandum Decision dated May 16, 1990, citing its earlier holding, in *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987), that a bank does not violate the Sherman Act simply by pegging its interest rate to the interest rates of other banks, and pointing out that petitioner herein had failed to supply any evidence to show that the Alaska bank's practice of pegging its rate to that of FIBO was anything but a legitimate business practice. (App. A-4-5.) Moreover, it held that petitioner had supplied no evidence from which a trier of fact might reasonably conclude that FIBO or FIBC was liable for misrepresentation to petitioner, with whom these banks had no business relationship whatever. (App. A-5.) Because the District Court, in its summary judgment deliberation, had weighed both state and federal claims relying upon the allegation of conspiracy, the Court of Appeals held that it was a proper exercise of the District Court's discretion to render summary judgment on all claims, including the state claims. (App. A-5.)



Petitioner sought rehearing, which was denied by Order dated July 18, 1990, from which his Petition for Writ of Certiorari was brought.

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### SUMMARY OF ARGUMENT

Petitioner failed to supply any plausible evidence that FIBC or FIBO conspired to fix prices; that the Alaska bank's pegging of its rate to that of respondent banks was anything but a legitimate, unilateral business practice; or that, indeed, FIBC or FIBO had any knowledge of or connection whatever with petitioner's financial arrangement with his Alaskan bank. Petitioner's central contention, that as a *pro se* litigant, he was entitled to explicit prior notice by the trial court as to his evidentiary burden in opposing a summary judgment motion, is unsupported by precedent in this Court or in any of the circuits. Even if it is assumed that district courts have a duty to affirmatively apprise *pro se* civil litigants of the necessity for filing affidavits in opposition to a properly supported motion for summary judgment, the courts should not be tasked with the duty of explaining in detail the standards for adjudicating such motions, or with specifying the quantity and quality of evidence necessary to sustain a litigant's burden. Such a requirement would inject the trial court into the adversary process, erode the appearance of impartiality, and unfairly discriminate against parties represented by counsel. To hold a civil litigant who chooses to represent himself to the rules of civil procedure does not constitute a denial of due process or equal protection, and the petition should be denied.

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## REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has failed to demonstrate that the ruling of the Ninth Circuit Court of Appeals is in conflict with the decisions of other circuits regarding the rights of a *pro se* civil litigant. He has also failed to demonstrate that the Court of Appeals departed from the accepted and usual course of judicial proceedings in sustaining a dismissal of both federal and pendent state claims, where the petitioner had failed to supply any probative evidence which could reasonably support such claims.

### I. A *PRO SE* CIVIL LITIGANT IS NOT ENTITLED TO PRIOR ADVICE BY THE COURT AS TO THE PRECISE QUANTUM OF PROOF REQUIRED TO AVOID A SUMMARY JUDGMENT DISMISSAL.

Petitioner has argued that this Court's recent pronouncements regarding the burden of proof of a party opposing summary judgment under FRCP 56 resulted in a change in the Rule from that which existed when he filed his complaint in 1984. Based upon this assertion, he contends that when a motion for summary judgment has been brought against a *pro se* civil litigant such as himself, the trial court must affirmatively advise him not only of the need to file an affidavit in opposition,<sup>2</sup> but also as to

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<sup>2</sup> Respondents do not herein contest the obligation to provide such notice, which, as discussed in the following section, has been recognized by some of the circuit courts. Petitioner Plunkett was fully aware of his obligation to file affidavits to oppose a motion for summary judgment, and in fact did so. Cf., App. I, J.

the precise standard for determining whether such evidence is sufficient to prevent summary judgment. Petitioner contends that the Ninth Circuit's decision in *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986) as to the rights of *pro se*, non-prisoner litigants is at odds with decisions in other circuits, and therefore requires this Court's attention. Assuming the *Jacobsen* decision is different from that of other circuits, such difference is not presented by the issues in this petition. The type of notice demanded by petitioner has not been required by any federal court, nor should it be imposed.

A. *The Standard for Granting Summary Judgment has not Changed in Any Manner which would Affect the Outcome as to Petitioner's Claims.*

Petitioner's brief focuses upon a case relied upon by both the District and Circuit Court below, *California Architectural Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), which set forth the burden of a party opposing summary judgment, based upon this Court's recent decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). These decisions make clear that, when a conspiracy has been alleged, where defendant has produced affidavits denying that it acted or intended to act in furtherance of a conspiracy, and where defendant has demonstrated that the specific acts identified by the plaintiff were in fact lawful actions in pursuit of legitimate business ends consistent with permissible competition, the burden is upon the non-moving party to

establish a genuine dispute of fact. To show a "genuine" factual issue that may be resolved only by a finder of fact, the plaintiff must show that such issues may reasonably be resolved in favor of either party; if the factual context makes the plaintiff's claim implausible, the plaintiff must come forward with more persuasive evidence to show that there is a genuine issue for trial. Petitioner argues that this standard, and this Court's recent pronouncements on the standards of Rule 56, constituted such a change in the burden to be met by a party opposing summary judgment as to require explicit notice thereof to a *pro se* litigant.

FRCP 56(e), however, has long provided that, when a motion for summary judgment is made and supported with affidavits, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must supply affidavits or other evidence showing that there is a "genuine issue" for trial. The amount or quality of evidence necessary to produce a "genuine" issue has always been a complicated question of fact and law, suffering from misuse by lawyers and courts alike. See generally, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 FRD 465, 467 (1984). As the foregoing article points out, however, Rule 56(e), since its amendment in 1963, has required the party opposing summary judgment to "set forth specific facts" showing a genuine issue, with the effect that

. . . the opposing party must rebut the moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. for the moving party.

Schwarzer, 99 FRD 465 at 482. *Celotex*, *Anderson*, and *Matsushita* did not change this standard; these cases restated and clarified the opponent's burden, to resolve confusion and insure uniformity in the federal courts. The opponent's evidentiary burden has long been one to produce sufficient evidence to resist a directed verdict and to require submission to the trier of fact. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), wherein the petitioner had alleged conspiracy and violation of anti-trust laws, the Court held that respondent oil company's refusal to deal with petitioner did not itself create a genuine issue of fact, and that the burden was not on the respondent to demonstrate the absence of a genuine issue. The Court held that Rule 56(e) requires

. . . that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

The Court went on to hold that the plaintiff could not proceed to a jury trial without " . . . any significant probative evidence tending to support the complaint." *Id.* at 290, 20 L.Ed.2d 569, 88 S.Ct. 1575. *Cities Service*, which was relied upon in *Anderson*, 477 U.S. 242 at 248-9, preceded petitioner's 1984 complaint herein.

Prior to petitioner's complaint, numerous decisions in the Ninth Circuit also clearly stated the requirement that the party opposing summary judgment must produce sufficient evidence as to permit reasonable persons to disagree on the outcome of the issue. Relying heavily upon Ninth Circuit precedent, Judge Schwarzer's 1984 article stated that the usual issue

. . . is whether the proponent of an inference comes forward with sufficient evidence to sustain a judgment in his favor. The test of sufficiency is whether, on the evidence, a jury verdict would be sustained. If the evidence would compel a directed verdict or judgment n.o.v. against the opponent of the motion, there is no genuine issue and the motion must be granted.

Schwarzer, 99 F.R.D. 465 at 481. In fact, several Ninth Circuit decisions, prior to petitioner's complaint, dismissed antitrust conspiracy claims because of the failure of the plaintiff's evidence to rise to the level necessary to support a verdict. *See, Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901-03 (9th Cir. 1983); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982); *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624-5 (9th Cir. 1977); and *California Shipping Co., Inc. v. Pacific Far East Line, Inc.*, 453 F.2d 380, 381 (9th Cir. 1971).

As discussed in the following section, petitioner has failed to come forward with any significant probative evidence to support a theory of conspiracy or his other theories. Assuming, *arguendo*, that his affidavits create some relevant factual issue, he has created no "genuine" issue by proffering facts sufficient to submit the issue to a jury. Summary judgment would have been proper under the standard applied in *Cities Service* and in the Ninth Circuit precedent existing at the time he filed his complaint. Dismissal of petitioner's claims herein was not dependent upon this Court's recent clarification and reiteration of a party's burden to oppose summary judgment under FRCP 56(e).



B. *A Pro Se Litigant is Not Entitled to Prior Judicial Explanation of Standards for Granting Summary Judgment.*

Even if *Celotex*, *Anderson*, and *Matsushita* constituted a new and different interpretation of a party's burden in opposing summary judgment, this does not entitle a *pro se* litigant to some special notice not afforded to other litigants. While this Court has held *pro se* litigants, particularly those who are prisoners, to less stringent requirements in complaint pleading than it would a party represented by counsel (see *Haines v. Kerner*, 404 U.S. 519, 520-21, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972); *Boag v. MacDougall*, 454 U.S. 364, 365, 70 L.Ed.2d 551, 102 S.Ct. 700 (1982)), it has also warned *pro se* litigants that they will be accorded neither special treatment nor leniency. *Faretta v. California*, 422 U.S. 806, 835, n. 46, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975) (rejected notion that right of self-representation was "a license not to comply with relevant rules of procedural and substantive law.")

Nevertheless, several circuit courts have recognized that a *pro se* litigant is entitled to notice of the consequences of failure to submit affidavits in response to a motion for summary judgment. *Jaxon v. Circle K Corp.*, 773 F.2d 1138 (10th Cir. 1985); *Garaux v. Pulley*, 739 F.2d 437 (9th Cir. 1984); *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); and *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). With the exception of *Jaxon*, these were all civil cases brought by *pro se* prisoners.

Unlike the Tenth Circuit in *Jaxon*, the Ninth Circuit declined to extend to non-prisoner *pro se* litigants the right to prior notice from the Court as to their need to file



affidavits in opposition to a motion for summary judgment. *Jacobsen v. Filler*, 790 F.2d 1362, 1364-6 (9th Cir. 1986). *Jacobsen* and *Jaxon*, however, do not present a conflict in the circuits which is highlighted by the case at bar. None of the circuits, nor any other courts, have ever held that a *pro se* litigant, prisoner or non-prisoner, is entitled to the level of assistance from the Court demanded by petitioner herein. Courts recognizing the right of a *pro se* litigant to notice of the bare procedural requirement that an affidavit be filed have done so in the face of a very real possibility of a miscarriage of justice. Such courts have declined to dismiss what may be a valid claim simply because of the *pro se* litigant's ignorance of the rudimentary Rule 56 requirement that he must, though at a stage prior to trial, put his evidence into affidavit form.

In *Jaxon*, the *pro se* plaintiff in a civil rights action opposed summary judgment with a substantial collection of material<sup>3</sup> which, in the appellate court's view, would

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<sup>3</sup> *Jaxon's* opposition to summary judgment attached EEO-1 Employer Information Reports submitted by defendant which raised an inference of discrimination against blacks; it contained *Jaxon's* unsworn reiteration of specific racial statements made to him by defendant's area director; it attached a decision of a state agency, after a hearing, that defendant employer had no intention to comply with an EEOC settlement agreement pertaining to *Jaxon*; and it attached unverified statements taken by the EEOC which tended to undermine the credibility of defendant's summary judgment affidavits. *Jaxon*, 733 F.2d 1138 at 1139-40. By contrast, petitioner herein has made no showing of what additional evidence he could now muster to support his claims, now that he understands the extent of his burden to produce such evidence. The record shows that he had been given ample opportunity, prior to hearing, to pursue discovery from FIBC and FIBO in order to support his opposition to summary judgment, but declined to do so.

have required denial of the motion if it were put into the form of sworn evidence as required by the rules. 773 F.2d 1138 at 1139-40. However, neither *Jaxon* nor any other case has suggested that a *pro se* litigant is entitled to be given any judicial advice or notice beyond the mere procedural requirement of filing an affidavit.

Petitioner Plunkett needed no advice from the trial courts as to the rudimentary requirements of opposing summary judgment; indeed, his petition to this Court demonstrates his capability of reading, understanding and following Court procedural rules. Petitioner contends, however that he should have been given additional advice from the court as to the precise character or quantum of evidence he needed to produce to avoid summary judgment. This would, of necessity, require the court to first review the moving party's affidavits and the law applicable to the case, for without this context, intelligent advice or notice as to the opposing party's evidentiary burden may not be given. This would invite an open-ended participation by the Court in the *pro se* litigant's presentation of his opposition to summary judgment. The appearance of judge as advocate would be unfair to other litigants and damaging to the appearance of impartiality upon which acceptance of judicial decisions is based. Moreover, prior judicial advice as to a party's precise burden in opposing summary judgment may well spawn further litigation as to the correctness of such advice. Unless a *pro se* litigant is advised of all the nuances of the judicial gloss placed upon the summary judgment rule by the latest appellate decisions, he may claim a denial of due process, if due process is held to require the type of notice sought herein by petitioner.

FRCP 56(e) afforded petitioner with notice of his obligation to present sufficient facts to create a "genuine issue". If it was necessary for him to consult a professional to determine the precise meaning of this requirement, in the context of his claims and the facts presented in opposition to his claims, his remedy was to seek assistance from an attorney, not the trial court. As stated in *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977),

The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an "advocate" for or to assist and guide the *pro se* layman through the trial thicket.

## II. SUMMARY JUDGMENT DISMISSAL OF PETITIONER'S CLAIMS WAS APPROPRIATE

The Court of Appeals acted correctly in sustaining a dismissal of Plunkett's claims when he was unable to supply any probative evidence to distinguish his case from *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987), or to otherwise demonstrate that respondents FIBC and FIBO had conspired with the Alaska bank or had any knowledge or connection whatever with the loans made to petitioner.

*Wilcox* properly held that FIBO's practice of changing its prime rate whenever any four of seven specific banks changed theirs is not in itself violative of the Sherman Act, 15 U.S.C. §1, in that a competitor's practice of independently, as a matter of business judgment, following

the prices of an industry leader " . . . does not establish any suppression of competition or show any sinister domination." *Wilcox*, 815 F.2d 522 at 526, quoting from the opinion in *United States v. International Harvester Co.*, 274 U.S. 693, 708-09, 71 L.Ed. 1302, 47 S.Ct. 748 (1927). After full analysis of FIBO's unilateral actions in setting its prime rates, the *Wilcox* court concluded that such practices

. . . Are motivated by legal, non-collusive business practices. Near uniformity in prime interest rates reflects a competitive market for funds. Prime rates will arguably be nearly identical when each bank pursues its individual self-interest because failure to follow national prime rates could cause either losses or severe liquidity problems.

*Wilcox*, 815 F.2d 522 at 528. It was therefore incumbent upon petitioner herein to produce additional probative evidence, distinguishing *Wilcox* and demonstrating unlawful concerted activity or intention to suppress competition or monopolize. Petitioner produced no such evidence.

Moreover, petitioner failed to sustain his burden of showing any nexus whatever between FIBC or FIBO and the loans made to petitioner by the Alaska bank. The circumstantial evidence presented by petitioner simply fails to meet the burden established by this Court in conspiracy cases, in that it does not create an inference of conspiracy which is more probable than an inference of independent action. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 at 280.

The evidence at summary judgment showed that the Alaska bank unilaterally referenced the Oregon bank's prime rate, for purposes of convenience; that neither FIBC nor FIBO had any ownership interest in the Alaska bank or participated in the subject loans, nor had any knowledge as to them; that the subsequent franchise arrangement between FIBC and the Alaska bank had no bearing upon the subject loans; that coincidences in last names of bank employees, and the hiring by the Alaska bank of a fired FIBO employee, were not in furtherance of any conspiracy; and that neither FIBC nor FIBO played any role in denial of credit to petitioner by other Alaska banks. On the basis of such evidence, this Court should continue the policy set forth in *First National Bank v. Cities Service Co.*, 391 U.S. 253 at 290:

While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti-trust complaint setting forth a valid cause of action be entitled to a full-dressed trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Because all of petitioner's remaining federal and state claims relied upon some showing of connection between FIBC or FIBO and the loans made to petitioner, the court of appeals properly sustained dismissal because petitioner failed to produce any such evidence. Additionally, with regard to his RICO and fraud claims, petitioner failed to produce any evidence that FIBO had represented to any party, much less petitioner, that its prime rate was the lowest rate charged to any customer under any circumstance, and dismissal was warranted.

The District Court below properly exercised its discretion in dismissing with prejudice both the federal claims and the pendent state claims. The Court was presented with the parties' affidavits and arguments regarding the viability of all claims, and the Court evaluated both the federal and state claims in its review of the summary judgment issues. Where the Court and the litigants expend considerable time on pendent claims before antitrust claims are dismissed, it is proper for the Court to retain jurisdiction and decide the state claims. *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227-28 (9th Cir. 1976) (*per curiam*), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed.2d 593 (1977). Where, as in the case at bar, evidence and argument on the pendent claims are presented simultaneously for decision by the court, and the court concludes that the pendent claims have not been supported, they should be dismissed with prejudice, rather than relitigated in state court; such procedure furthers the interests of judicial economy, convenience, and fairness to litigants, which are the recognized purposes of the discretionary exercise of pendent jurisdiction. *See, United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

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## CONCLUSION

A *pro se* civil litigant is not denied due process or equal protection because he is not provided special judicial notice of his precise burden of proof in opposing summary judgment. A contrary rule would draw the trial courts into the adversary process and would discriminate against parties who are represented by counsel. Petitioner failed to present any concrete evidence to support his claim of conspiracy or his other claims, and dismissal was proper.

Respectfully submitted,

SAUL R. FRIEDMAN

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*First Interstate Bank Corporation and*

*First Interstate Bank of Oregon*





APPENDIX A

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MICHAEL E. PLUNKETT,	)	
Plaintiff-Appellant,	)	No. 89-35500
	)	
and	)	D.C. No.
	)	CV-84-387-HRH
LANE, KNORR & PLUNKETT,	)	
ARCHITECTS AND PLANNERS;	)	
LANE, KNORR & PLUNKETT	)	
INVESTMENT COMPANY, a/k/a	)	MEMORANDUM*
LKP Investment Company,	)	(Filed May 16,
Plaintiffs-Appellants,	)	1990)
	)	
vs.	)	
FEDERAL DEPOSIT INSURANCE	)	
CORPORATION, Receiver of	)	
First Interstate Bank of Alaska;	)	
FIRST INTERSTATE BANK	)	
CORPORATION; FIRST	)	
INTERSTATE BANK OF OREGON,	)	
Defendants-Appellees.	)	

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Appeal from the United States District Court  
for the District of Alaska

H. Russel Holland, District Judge, Presiding

Submitted: May 11, 1990 \*\*

Seattle, Washington

Before: FARRIS, PREGERSON, and FERGUSON, Circuit  
Judges.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

Michael E. Plunkett, a pro se plaintiff and appellant, appeals summary judgment against him. Plunkett's suit pertains to circumstances surrounding two commercial loans he obtained from the Alaska Bank of Commerce (ABC) in 1981 and 1982. Plunkett was given a rate of interest by ABC pegged to the prime rate offered by the First National Bank of Oregon (FNBO) to FNBO's most creditworthy borrowers. FNBO, subsequently renamed First Interstate Bank of Oregon (FIBO), has been at all relevant times a wholly-owned subsidiary of First Interstate Bank Corporation (FIBC). In 1983, ABC entered into a franchise agreement with FIBC and was renamed First Interstate Bank of Alaska (FIBA) (now in receivership and represented as an appellee by the Federal Deposit Insurance Corporation).

Plunkett argues that FIBA, FIBO, and FIBC conspired with other, unnamed entities to fix the rate of interest offered to commercial borrowers, causing Plunkett to pay illegally inflated rates on his loans. He further contends that FIBO's definition of "prime rate" was intended to induce the false belief among its borrowers that the prime rate was the lowest rate FIBO offered, and that the FIBA reference to that rate on his loan instruments manifested a conspiracy between the two banks (and the Oregon bank's parent, FIBC) to deceive him. These contentions formed the basis for Plunkett's federal claims under section one of the Sherman Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, 1962, and his pendent Alaska claims (statutory, breach of contract, fraud, civil conspiracy, interference with contract, interference with prospective economic advantage, intentional infliction of

emotional distress, and an assortment of so-called "prima facie torts of various descriptions," including "gross negligence, recklessness, . . . wrongful foreclosure, usury, tortious breach of contract and others."

The district court granted summary judgment for FIBA, FIBO, and FIBC on the ground that Plunkett presented no credible evidence that the banks engaged in any actionable conduct. As a matter of law, the court held, no trier of fact could find for Plunkett.

### STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire and Casualty Co. v. Martin*, 872 F. 2d 319, 320 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *Judie v. Hamilton*, 872 F. 2d. 919, 920 (9th Cir. 1989).

### DISCUSSION

Plunkett insists that he established a prima facie case and is entitled to try it. First, he points to another case, *Wilcox Dev. Co. v. First Interstate Bank of Oregon*, 605

F.Supp 592 (D.Or.1985), where a jury returned a verdict against FIBO on a Sherman Act claim. Second, he appears to rely on another part of that case in its appellate incarnation, *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987), where summary judgment for defendant on a RICO claim was reversed and remanded. It was alleged in the *Wilcox* plaintiffs' RICO claim that FIBO made false representations about its prime rate being the lowest rate given to creditworthy borrowers. Plunkett apparently infers that the issue of whether FIBO misrepresented its interest rate is therefore triable here. Third, Plunkett asserts that FIBO actually participated in loans granted by FIBA during the period of Plunkett's loans, and argues that that participation constitutes evidence of rate-fixing activity and collusion by the banks in the fraud associated with FIBA's use of FIBO's prime rate as a reference for its own loans. Finally, Plunkett argues that a former loan officer at FIBO was subsequently employed in the same capacity by FIBA, further linking the activities of the defendants with respect to rate-fixing and FIBO's misrepresentation of its prime rate.

The district court correctly ruled that Plunkett's facts cannot withstand a summary judgment motion under Fed. R. Civ. P. 56(c), as construed by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *California Architectural Building Products v. Franciscan Ceramics*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988), and *Levin v. Knight*, 780 F.2d 786 (9th Cir. 1986). First, as to the anti-trust claim, *Wilcox*, 815 F.2d 522, controls. We held there that a bank does not violate the Sherman Act simply by pegging its interest rate to the interest rates of other banks. A mere showing by a plaintiff of rate parallelism is

not enough. *Id.* at 526. Plunkett has failed to demonstrate that FIBA's pegging of its rate to that of FIBO was anything but a legitimate business practice. In fact, he does not begin to approach the level of proof of unlawful concerted activity required for his antitrust claim, as the district court noted.

Second, as to the various claims deriving from Plunkett's fraudulent collusion theory, even assuming, *arguendo*, that FIBO and FIBC are liable for misrepresentation to Oregon borrowers, there is nothing in the record from which a trier of fact might reasonably conclude that *Plunkett* has a cause of action against FIBA, FIBO, and FIBC. He had no business relationship with either FIBO or FIBC and cannot demonstrate that any relationship either had with FIBA affected him. Neither the banks' business connections nor the fact that FIBA and FIBO may have employed the same loan officer at different times offers credible evidence of collusive conduct against Plunkett. The district court, it must be concluded, correctly rejected Plunkett's allegation that the banks conspired to defraud him.

Plunkett alternatively seeks to have his pendent claims dismissed without prejudice. Since all of his claims, both state and federal, are based on an allegation of conspiracy, the district court rendered summary judgment against all of them. This was certainly within the court's discretion, *Schultz v. Sundberg*, 759 F.2d 714, 718, (9th Cir. 1985), and, especially given the factual paucity of appellant's case, a proper exercise of discretion, *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir. 1984).

The district court is AFFIRMED.

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The court has now before it a motion by defendants First Interstate Bank of Oregon (FIBO) and First Interstate Bancorp (FIBC) seeking summary judgment, judgment on the pleadings, and, alternatively, for more definite statement. The motion is made pursuant to Rules 12(c) and 56, Federal Rules of Civil Procedure, and is made on the grounds that there are no genuine issues of material fact in dispute and that the defendants are therefore entitled to judgment as a matter of law, judgment on the pleadings, or, alternatively, a motion/order for a more definite statement. The motion is opposed by plaintiff. The court has heard oral argument.



In 1981, the plaintiff executed a note to secure a loan from the Alaska Bank of Commerce in the amount of \$1.667 million at an interest rate equal to 3.5% above "the prime rate". The note defined "the prime rate" as being "the prime rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON, to its most credit worthy borrowers during the term of this note." On February 11, 1982, plaintiff borrowed \$335,600.00 from the Alaska Bank of Commerce, upon which interest was set at the "prime rate" of FIBO.

At the time the loans were made, the Alaska Bank of Commerce had no connection with either FIBC or FIBO. FIBO, formerly known as First National Bank of Oregon, was at all pertinent times a wholly-owned subsidiary of FIBC. Neither of FIBO or FIBC was involved in the loans to the plaintiff, nor did they have knowledge of the loans. Neither FIBO nor FIBC had (or have) any participation in the loans.

In February 1983, the Alaska Bank of Commerce entered into a franchise agreement with FIBC and changed its name to First Interstate Bank of Alaska (Interstate of Alaska). The franchise agreement did not result in either FIBC or FIBO obtaining any interest in First Interstate Bank of Alaska, nor did it result in either entity becoming a participant in the loan to the plaintiff.

Rule 56(c), Federal Rules of Civil Procedure, provides in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law.

The court views the evidence and the inferences therefrom in the light most favorable to the non-moving party. *Levin v. Knight*, 780 F.2d 786, 787 (9th Cir. 1986).

Three U.S. Supreme Court cases have clarified what a non-moving party must do to withstand a summary judgment motion. As explained by the Ninth Circuit in *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987):

First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. See *Celotex Corp. v. Catrett*, [477 U.S. 317], 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party.*" *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242] 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The plaintiff's revised second amended complaint makes eleven claims for relief.

The plaintiff's first claim for relief is that the defendants committed a violation of the "Sherman Act, 15 U.S.C. § 1, *et seq.*" The plaintiff contends that the defendants engaged in this unlawful conduct as follows: first, FIBO engaged in unlawful conduct with persons not named as defendants, by using the "count of four" method of setting the prime rate of FIBC. Second, FIBO and Interstate of Alaska conspired to fix prices and Interstate of Alaska subsequently contracted with the plaintiff.

The "count of four" method of setting a bank's prime rate involves a bank following the lead of four other major banks. This method of setting the prime rate has been expressly held as being non-violative of the Sherman Act. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1987). The plaintiff claims that *Wilcox* is inapplicable to the instant case because *Wilcox* involved a bank exercising competitive independent business judgment.

"[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

*Id.* (citation omitted).

While the plaintiff's understanding of *Wilcox* is correct, he fails to provide the court with any facts which evidence "any suppression of competition or show any sinister domination." Indeed, all of the plaintiff's argument in this regard amounts to pure allegation and speculation. FIBO and Interstate of Alaska had no relationship whatsoever at the time the subject loans were made. Furthermore, "[r]eliance on other banks' prime rate

charges is a convenient and accurate way for [a bank] to maintain its prime rate at the level set by the national market." *Id.* The Ninth Circuit's decision in *Wilcox* is also highly instructive on the issue of a plaintiff's burden of proof in a Sherman Act case such as the case at bar. Specifically, the court in *Wilcox* held:

Horizontal price setting is illegal *per se*. The borrowers are not required to prove that defendants entered into an express agreement to fix prices. An agreement may be inferred from circumstantial evidence of "a common design and understanding, or a meeting of minds in an unlawful arrangement. . . ." Nevertheless, when relying solely on circumstantial evidence, a plaintiff must present evidence from which an inference of conspiracy is more probable than an inference of independent action. The plaintiff's burden is to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that the defendant acted independently of the alleged co-conspirators, and thus lawfully." Thus, antitrust law limits the range of permissible inferences from ambiguous evidence. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

*Id.* at 525 (citations omitted).

The plaintiff has failed to make a showing that there are genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. At oral argument on this matter, plaintiff argued that the mere denial of his allegations by officers of the defendant entities is not sufficient evidence

to sustain their motion for summary judgment. The plaintiff fails to understand that, per *California Architectural Building Products, Inc.*, 818 F.2d at 1468, as the non-moving party bearing the burden of proof at trial, he must make a showing sufficient to establish a genuine dispute of fact with respect to the existence elements of his case. The evidence submitted by the plaintiff simply fails to make such a showing.

The plaintiff contends that the "placement of loan officers", including Robert McWhorther, a former FIBO employee, at Interstate of Alaska, supports his contention that there was a conspiracy to fix prices. This contention, along with the rest of plaintiff's arguments, does not meet the plaintiff's burden to produce evidence "that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that the defendant acted independently of the alleged co-conspirators, and thus lawfully." In fact, McWhorther had been fired by FIBO and had himself filed a lawsuit against FIBO alleging breach of contract and outrageous conduct and deceit. There is no genuine issue of material fact in dispute as to whether or not McWhorther was a "plant" of FIBO. The facts (as opposed to plaintiff's speculation and conjecture) are that he was not.

Furthermore, the "correspondence" relationship between the banks that plaintiff contends is further evidence of a conspiracy is completely unsupported by any of the facts before the court. There must have been some communication regarding Oregon's prime rate; but acquiring knowledge of what that rate was and merely referencing it is not a conspiracy.

Thus, the defendants' motion for summary judgment will be granted as to the plaintiff's first claim for relief.

The plaintiff's remaining ten claims for relief all hinge on the allegation that the FIBO and FIBC conspired between themselves and/or with other entities. The plaintiff has failed to establish any conspiracy between defendants FIBC and FIBO and/or between either of those entities and the other defendants. Nor has the plaintiff made any showing whatsoever that FIBC or FIBO conspired with any other person or entity to do anything which would support any of the plaintiff's other ten claims for relief. In short, since the facts before the court do not indicate that there is any reason to believe that either FIBC or FIBO had any actionable connection whatsoever with the plaintiff, it is inescapable that summary judgment must be granted in favor of defendants FIBC and FIBO.<sup>1</sup>

For the foregoing reasons, the defendants' motion for summary judgment is hereby granted. Plaintiff's complaint against defendants First Interstate Bank of Oregon and First Interstate Bancorp is hereby dismissed.

DATED at Anchorage, Alaska, this 12th day of May, 1989.

/s/ H. Russel Holland  
United States District Judge

cc: M. Plunkett  
J. Hedland (HEDLAND)  
J. Gorski (HUGHES)

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<sup>1</sup> In light of this conclusion, the court need not address the defendants' alternative motions.

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APPENDIX C

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907-274-7522

Attorneys for Federal Deposit Insurance Corporation

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT, et al.,	)	
Plaintiff,	)	
vs.	)	
FIRST INTERSTATE BANK	)	No. A84-387
OF ALASKA, et al.,	)	
Defendants.	)	
<hr/>		

FINAL JUDGMENT

(Filed June 10, 1989)

This court having granted motions for summary judgment in favor of the defendants,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' complaint against defendants, First Interstate Bank of Oregon, First Interstate Bancorp, and FDIC, receiver of First Interstate Bank of Alaska, is hereby dismissed.

DATED at Anchorage, Alaska, this 16th day of June, 1989.



C-2

/s/ H. Russel Holland  
United States District Judge

cc: O&J 3571  
M. Plunkett  
J. Hedland (HEDLAND)  
J. Gorski (HUGHES)

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**APPENDIX D**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ALASKA**

MICHAEL E. PLUNKETT,	)	
et al.,	)	
	)	No. A84-387 Civil
Plaintiffs,	)	
	)	<b>ORDER</b>
vs.	)	
	)	(Status Conference)
FIRST INTERSTATE BANK	)	(Filed Sep. 22, 1988)
OF ALASKA,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

---

A status conference was held in this case on September 19, 1988.

This case is again at issue with the filing of amended pleadings, including an answer of the Federal Deposit Insurance Corporation as receiver for First Interstate Bank of Alaska on June 23, 1988. The court's stay on account of the involvement of the FDIC in the case has expired.

The court has pending a motion for summary judgment brought on behalf of First Interstate Bancorp and First Interstate Bank of Oregon. The parties are concerned that there is additional discovery which ought to be done as a predicate to the court's consideration of that motion. Counsel have agreed that plaintiff will undertake such discovery as he deems necessary for purposes of the defendants' summary judgment motion. That discovery shall be completed on or before November 22, 1988. On

or before December 7, 1988, plaintiff may file a supplemental opposition to defendants' motion for summary judgment. Defendants may file a supplemental reply on or before December 19, 1988.

The court and parties discussed, and it has been clearly understood, that plaintiff must accomplish any discovery which he deems necessary or appropriate to the summary judgment motion of defendants within the time provided hereinabove. It is equally clear, however, that should defendants' motion for summary judgment be denied, there may be additional discovery to be undertaken, and the court will address that possibility at a subsequent date.

Defendant FDIC has indicated that it will be filing a motion for summary judgment also. That motion shall be served and filed on or before October 20, 1988, in order that it may be considered with the other defendants' like motion.

DATED at Anchorage, Alaska, this 21 day of September, 1988.

/s/ H. Russel Holland  
United States District Judge

cc: M. Plunkett  
J. Hedland (HEDLAND)  
J. Gorski (HUGHES)

---

**APPENDIX E**  
**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

MICHAEL E. PLUNKETT,	)	
Plaintiff-Appellant,	)	
	)	
and	)	No. 89-35500
	)	
LANE, KNORR & PLUNKETT,	)	
ARCHITECTS AND PLANNERS;	)	
LANE, KNORR & PLUNKETT	)	
INVESTMENT COMPANY, a/k/a	)	
LKP Investment Company,	)	
	)	ORDER
Plaintiffs-Appellants,	)	
	)	
vs.	)	(Filed
	)	July 18, 1990)
FEDERAL DEPOSIT INSURANCE	)	
CORPORATION, Receiver of First	)	
Interstate Bank of Alaska; FIRST	)	
INTERSTATE BANK	)	
CORPORATION; FIRST	)	
INTERSTATE BANK OF OREGON,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

---

Before: FARRIS, PREGERSON, and FERGUSON, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has

requested a vote on the suggestion for rehearing en banc.  
Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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APPENDIX F

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Attorneys for Defendant  
FIRST INTERSTATE BANCORP  
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT;  
LANE + KNORR + PLUNKETT,  
Architects and Planners; LANE +  
KNORR + PLUNKETT, Investment  
Company, and all others similarly  
situated,

Plaintiffs,

vs.

FIRST INTERSTATE BANK  
OF ALASKA, formerly, Alaska Bank  
of Commerce; FIRST INTERSTATE  
BANCORP; FIRST INTERSTATE  
BANK OF OREGON, formerly First  
National Bank of Oregon; and  
unknown defendants DOES 1  
through 100,

Defendants.

Case No.  
A84-387 CIV

AFFIDAVIT OF  
WILLIAM M.  
DAVIDSON

STATE OF OREGON

County of Multnomah

ss.

William M. Davidson, being first duly sworn, deposes and says:

1. I am a Senior Vice President of and Senior Credit Officer for First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and have held that position since March 1982.

2. In my position as Senior Credit Officer for this Bank, I am the person who has knowledge of all participation loans in which this Bank has an interest. I understand that this action arises out of two loans made by the Alaska Bank of Commerce to Michael E. Plunkett, and/or entities in which he has an interest as reflected by the caption herein, the most recent loan having been made on February 11, 1982. First Interstate Bank of Oregon, N.A. is not now nor has it ever been a participant in any of the said loans nor has it otherwise become involved in any way in such loans. This Bank has not received any money whatsoever from any source relating in any manner to the said loans.

3. This Bank, to my knowledge, did not make any representations, written or oral, to Mr. Plunkett or have any conversations with him whatsoever in connection with the loans in questions. Similarly, to my knowledge, this Bank had no communication with any of the entities in which Mr. Plunkett has an interest.

FURTHER AFFIANT SAYETH NOT.

DATED:

/s/ William M. Davidson  
William M. Davidson



F-3

Subscribed and sworn to before me this 28th day of  
MARCH, 1988.

/s/

Notary Public for Oregon  
My Commission Expires: 1/21/91

---

APPENDIX G

John S. Hedland, Esq.  
HEDLAND, FLEISCHER, FRIEDMAN,  
BRENNAN & COOKE  
1227 West 9th Avenue, Suite 300  
Anchorage, Alaska 99501-3218  
907/279-5528

Attorneys for Defendant  
FIRST INTERSTATE BANCORP  
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT;  
LANE + KNORR + PLUNKETT,  
Architects and Planners; LANE +  
KNORR + PLUNKETT, Investment  
Company, and all others  
similarly situated,

Plaintiffs,

vs.

FIRST INTERSTATE BANK  
OF ALASKA, formerly, Alaska Bank  
of Commerce; FIRST INTERSTATE  
BANCORP; FIRST INTERSTATE  
BANK OF OREGON, formerly First  
National Bank of Oregon; and  
unknown defendants DOES 1  
through 100,

Defendants.

Case No.  
A84-387 CIV

AFFIDAVIT OF  
DAVID S.  
BELLES

STATE OF OREGON  
County of Multnomah

ss.

David S. Belles, first being duly sworn, deposes and states:

1. I am an Executive Vice President of First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and have held that position since September, 1978.

2. First Interstate Bank of Oregon, N.A., hereinafter FIOR, is a subsidiary of First Interstate Bancorp, a bank holding company. FIOR does not have any ownership interest in First Interstate Bank of Alaska. FIOR does not control, and never has controlled, activities of First Interstate Bank of Alaska, or its employees or officers.

3. I understand that this action arises out of two loans made by the Alaska Bank of Commerce to Michael E. Plunkett and/or entities in which he has an interest; the most recent one having been made on February 11, 1982. It is my understanding that the Alaska Bank of commerce loaned money to Mr. Plunkett at an interest rate that was pegged to the prime rate of First National Bank of Oregon. FIOR did not specifically authorize the Alaska Bank of Commerce to reference interest rates to FIOR's prime rate and I had no knowledge that it was doing so. It is, however, generally understood in banking circles that it was and is a common and accepted practice for one bank to reference interest rates charged on specific loans to another Bank's prime rate even though there is no relationship between the Banks. Further, not all banks announce a prime rate. It is not surprising that the Alaska Bank of Commerce selected the prime rate of First National Bank of Oregon as an interest index. This Bank is, and for a long period of time has been, one of the two

largest Banks in Oregon and Oregon is probably the Pacific Coast state most comparable to Alaska in terms of its economy.

4. FIOR's practice in announcing changes in its prime rate was and is to issue a brief press release for dissemination to interested local media. An exemplar of the form of press release used to announce prime rate changes during the period January 1980 through February 1982 is attached hereto as Exhibit A. The press releases do not state that the prime rate is the lowest rate charged any customer under any circumstance. Further, FIOR did not ever publicly announce or hold out that its prime rate was the lowest rate charged any customer under any circumstance.

5. I understand that plaintiff in this action alleges that certain defamatory statements were made by an individual named Frank Kaufmann, identified in the complaint as an employee of First Interstate Bank of Alaska. To the best of my knowledge, information and belief, and based upon my review of the records of FIOR, FIOR and its employees were totally uninvolved in such statements, and did not authorize, adopt or ratify them if they were, in fact, made. At no time did FIOR control or direct the activities of Frank Kauffman in any respect whatsoever.

6. I also understand that plaintiff in this action alleges that there was a conspiracy and collusion among various parties to deny plaintiff credit at several Alaska banks. To the best of my knowledge, information and belief, and based upon my review of the records of FIOR, if such a conspiracy or collusion existed, FIOR was not a party to it and had no knowledge of it or involvement in

it whatsoever. To the best of my knowledge, information and belief, FIOR never colluded, conspired or other [sic] otherwise acted in any manner whatsoever with respect to any attempts by plaintiff to obtain credit, and never sought in any manner whatsoever to prevent him from obtaining credit. If FIOR were, in fact, a party to such collusion or conspiracy, I believe it would have come to my attention. To the best of my knowledge, information and belief, and based upon my review of the records of FIOR, FIOR had never heard of, and had no dealings whatsoever with Mr. Plunkett and his companies until this lawsuit was filed. The only information that suggests any contact whatsoever is Mr. Plunkett's allegations in his complaint is that he contacted FIOR to ascertain its prime rate on several occasions.

FURTHER AFFIANT SAYETH NOT.

DATED:

/s/ David S. Belles  
David S. Belles

Subscribed and sworn to before me this 25th day of March, 1988.

/s/ Norma Nadine Thompson  
Notary Public for Oregon  
My Commission Expires:  
JANUARY 29, 1992

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EXHIBIT A  
NEWS RELEASE

Date: May 2, 1980

FIRST NATIONAL BANK OF OREGON

Contact: Ken Martin

Ref. No. 058001-P

First National Bank of Oregon Friday (May 2) lowered its prime rate to 18 $\frac{1}{2}$  percent per annum. The rate had been 19 percent since April 30.

Released 5/2 AP, UPI, Oregonian, Journal, DJC, Business wire

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APPENDIX H

John S. Hedland, Esq.  
HEDLAND, FLEISCHER, FRIEDMAN,  
BRENNAN & COOKE  
1227 West 9th Avenue, Suite 300  
Anchorage, Alaska 99501-3218  
907/279-5528

Attorneys for Defendant  
FIRST INTERSTATE BANCORP  
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT; )  
LANE + KNORR + PLUNKETT, )  
Architects and Planners; LANE + )  
KNORR + PLUNKETT, Investment )  
Company, and all others )  
similarly situated, )

Plaintiffs, )

vs. )

FIRST INTERSTATE BANK )  
OF ALASKA, formerly, Alaska Bank )  
of Commerce; FIRST INTERSTATE )  
BANCORP; FIRST INTERSTATE )  
BANK OF OREGON, formerly First )  
National Bank of Oregon; and )  
unknown defendants DOES 1 )  
through 100, )

Defendants. )

Case No.  
A84-387 Civ

AFFIDAVIT OF  
KENNETH K.  
KAUFMANN

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) SS.



KENNETH K. KAUFMANN, being duly sworn, deposes and states:

1. I am the Corporate Secretary of First Interstate Bancorp, a bank holding company and have served in that capacity since June, 1974.

2. On February 22, 1983, First Interstate Bancorp and the Alaska Bank of Commerce entered into a franchise agreement pursuant to which Alaska Bank of Commerce has the right to use the name First Interstate Bank of Alaska. This agreement authorizes the Alaska bank to participate in the automatic teller system operated by First Interstate Bancorp and allows the Alaska Bank to have access to certain other operational services provided by the Bancorp. It does not create any parent/subsidiary relationship between the signatories nor does it create any equity interest in the Alaska bank on the part of First Interstate Bancorp. First Interstate Bank of Oregon, N.A. is not a party to the franchise agreement. Other than the franchise agreement, which terminated on December 11, 1986, there was no relationship between the Alaska bank and either First Interstate Bank of Oregon, N.A. or First Interstate Bancorp. Prior to the execution of the franchise agreement, there was no relationship whatsoever.

3. First Interstate Bancorp does not control the activity of First Interstate Bank of Alaska or its employees, and has never controlled the activities of First Interstate Bank of Alaska or Alaska Bank of Commerce and its employees. It has no involvement in loans made by the Alaska Bank, and has never had such involvement.

Nor does it, or has it ever, controlled, dictated, or otherwise influenced the interest rates charged by it or the manner in which those interest rates are calculated.

4. I understand that this action arises out of two loans made by the Alaska Bank of Commerce to Michael E. Plunkett and/or entities in which he has an interest, the most recent one having been made on February 11, 1982. As of that date, there was no relationship between First Interstate Bancorp and the Alaska Bank of Commerce. First Interstate Bancorp was not a participant in any of the said loans nor did it become a participant or become otherwise involved in such loans in any manner by virtue of the franchise agreement or otherwise. First Interstate Bancorp has not received any money whatsoever from any source relating in any manner to the said loans.

5. To my knowledge First Interstate Bancorp did not make any representations, written or oral, to Mr. Plunkett, or have any conversations with him in connection with the loans in question. Similarly, to my knowledge, First Interstate Bancorp had no communication with any of the entities in which Mr. Plunkett has an interest.

6. To my knowledge, at no time did First Interstate Bancorp tell Mr. Plunkett or his companies that the prime rate announced by First Interstate Bank of Oregon or First National Bank of Oregon was the lowest rate at which it loaned money to any borrowers; nor did the Bancorp ever provide Mr. Plunkett with any other information regarding the prime rate charged by First Interstate Bank of Oregon. First Interstate Bancorp did not represent to Mr. Plunkett or his companies, directly or indirectly, or to the

public generally, that the announced prime rate charged by First Interstate Bank of Oregon, N.A. was the lowest rate charged by it to any of its borrowers.

7. I understand that plaintiff in this action alleges that certain defamatory statements were made by an individual named Frank Kauffman, identified in the complaint as an employee of First Interstate Bank of Alaska. To the best of my knowledge, information and belief, and based upon a review of the records of First Interstate Bancorp, Frank Kauffman was never an employee of First Interstate Bancorp. First Interstate Bancorp and its employees were totally uninvolved in such statements, and did not authorize, adopt or ratify them if they were, in fact, made. At no time did First Interstate Bancorp control or direct the activities of Frank Kauffman in any respect whatsoever.

8. I also understand that plaintiff in this action alleges that there was a conspiracy and collusion among various parties to deny plaintiff credit at several Alaska banks. To the best of my knowledge, information and belief, and based upon my review of the records of First Interstate Bancorp, if such a conspiracy or collusion existed, First Interstate Bancorp was not a party to it and had no knowledge of it or involvement in it whatsoever. To the best of my knowledge, information and belief, First Interstate Bancorp never colluded, conspired or otherwise acted in any manner whatsoever with respect to any attempts by plaintiff or any other person or entity to obtain credit, and never sought in any manner whatsoever to prevent him from obtaining credit. To the best of my knowledge, information and belief, and based upon a review of the records of First Interstate Bancorp,

First Interstate Bancorp had never heard of, and had no dealings whatsoever with, Mr. Plunkett and his companies until this lawsuit was filed.

FURTHER AFFIANT SAITH NOT.

DATED: March 24, 1988.

/s/ Kenneth K. Kaufmann  
Kenneth K. Kaufmann

SUBSCRIBED AND SWORN TO before me this 24th day of March, 1988.

[SEAL]

/s/ Olga Perez  
Notary Public in and for  
the State of California  
My commission expires: 9-20-89

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APPENDIX I

Michael E. Plunkett, Pro Se  
600 Barrow, Suite 600  
Anchorage, Alaska 99501  
(907) 277-5481.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett: Lane +	)	
Knorr + Plunkett, Architect	)	
and Planners; Lane + Knorr +	)	
Plunkett Investment Company;	)	
Plaintiffs	)	
	)	No. A84-387
v.	)	Civil
	)	
First Interstate Bank of	)	
Alaska formerly, Alaska Bank	)	
of Commerce; First Interstate	)	
Bancorp; First Interstate	)	
Bank of Oregon, formerly First	)	
National Bank of Oregon;	)	
Defendants.	)	
_____	)	

AFFIDAVIT OF MICHAEL E. PLUNKETT  
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT  
BY DEFENDANTS  
FIRST INTERSTATE BANK OF OREGON  
AND FIRST INTERSTATE BANCORP  
MOTION FOR CONTINUANCE  
MOTION TO STRIKE AFFIDAVITS

STATE OF ALASKA	)	
	)	s.s.
THIRD JUDICIAL DISTRICT	)	

Michael E. Plunkett, being duly sworn, deposes and  
states:

1. I am Michael Edward Plunkett, am a Plaintiff in this action, am owner of Lane + Knorr + Plunkett Investment Company, and Lane + Knorr + Plunkett, Architects and Planners, also Plaintiffs in this action.

2. I have personal knowledge of the following facts, am competent to testify as to them, and if called upon to testify at trial or hearing would testify as follows:

3. The first information I ever received tht [sic] First national [sic] bank [sic] of Oregon was not a participant in the loans which are the subject of this litigation was when I read the Affidavits submitted with the Motion for Summary Judgment on March 30, 1988. It was indicated to me at the time we signed the loans that First National Bank of Oregon, later First Interstate Bank of Oregon was the basis of the prime rate determination because said bank was to be or was the corresponding bank on the loan. The pegging of the prime rate to the Firt [sic] national [sic] bank [sic] of Oregon wa [sic] also a condition of the Committment [sic] Letter of May, 1980, a certified true and correct copy which is included as Exhibit 2, pages 35-42.

4. I hereby certify that Exhibit 1-5 attached to the complaint are true and correct copies of the various correspondence and loan documents executed by Plaintiffs in this case. As late as October 16, 1982 the second loan was extended, with the interest rate pegged to the prime rate of First Interstate Bank of Oregon.

5. I hereby certify that a continuance is needed due to the stay granted to First Interstate Bank of Alaska as succeeded by Federal Deposit Insurance Corporation. Plaintiff cannot conduct discovery against First Interstate

Bank of Alaska until the Revised Second Amended Complaint is answered by FIBA. I have found that to conduct the depositions of former FIBA employees like Chuck Homan or R.J. Miller without the documentation to refresh their memories would be a waste of time, particularly since the interest pegging decision had to be made prior to May 1980. I further certify that I am financially unable to conduct discovery in Oregon or to even pay the costs for copies of the transcripts from the Court cases held in Oregon. Further, from [sic] the affidavits of FIBO employees, it is clear that they do not recollect, at least without documentary evidence or other depositions to help them, any dealings at all with Alaska bank [sic] of Commerce or FIBA. Thus, requests for admission, interrogatories, and/or requests for production of these unstayed defendants would be of little value. However, I certify that a continuance is necessary to the extent the motion for summary judgment cannot be denied outright so that at least paper discovery of FIBO and FIBC can be made. Interrogatories will at least theoretically require the parties to conduct some investigation of records. Unfortunately, records may have vanished, and any decision regarding how the prime rate definition was generated may rest only in the minds of the one or two individuals who made the decision.

6. I have reviewed the affidavits of Moving Party and hereby certify that sufficient hostility exists between FIBA employees, former, particularly Robert McWhorter, Frank Kauffman, Albert Swallin, Charles Homan and others that I could not obtain an affidavit voluntarily from them, and even if I could their recollections would be so vague without some refreshment by documentary



evidence that the affidavits would be insufficient to resist the motion, that is to provide more genuine issues of material fact.

7. In 1979 I was led to believe by a Alaska Bank of Commerce Officer Johnson that financing had been obtained for our building through Oregon Trails Savings and Loan. Later this statement was repudiated by others at ABC. Oregon Trails was to be a participant and the prime rate was to be based on the Oregon Trails Prime Rate. When later, after Plaintiffs literally handed the take-out financing for the project to Homan from Alaska Small Business Loan Program, the committment [sic] letter had the First National Bank of Oregon listed as the basis for the prime rate.

9. When in early 1983 I learned of the franchise with FIBC, and had known of the buyout of First National Bank of Oregon, I was not surprised when Bob McWhorter became in charge of commercial loans, since I learned he had been with FIBO in Oregon, Eugene I think I learned. Kauffman had come aboard earlier, and after McWhorter took over things deteriorated. It was my analysis that McWhorter was either reporting to or looking out for the interests of the parent. FIBC or the participant, FIBO. Things immediately soured with FIBA and Plaintiff, FIBA started obtaining certificates of deposit from the Anchorage School District in large amounts like \$25,000,000 in a given month. At the same time credit was denied Plaintiffs, with McWhorter stating we were on an increasing spiral of debt or words to that effect. This was immediately after Plaintiff was terminated from its services on the Gruening Junior High School Project by ASD.

10. Plaintiffs incorporate all affidavits on file in this [sic] case as if fully set forth herein.

11. I certify further discovery is needed to determine the amount and style of interaction, if any between First Interstate of Oregon and First Interstate Bancorp and First Interstate of Alaska. This is especially true due to the fact that to continue to obtain funds from ASD, FIBA may have had to accede to the demands of ASD, such as squeezing Plaintiffs. This would benefit not just FIBA but the franchisor FIBC particularly if the franchise was on a percentage basis, and FIBO if they were participating with FIBA on any loans, of any kind, or FIBA was participating in some other way.

12. We were charged in excess of \$55,000 in loan fees on the first interim loan alone. No architects or engineers were ever retained to visit the site or review the design. This amount was never shown to us or broken down in any way. The high amount is either as a result of the risk incurred, or the fact that a portion of the loan fee went to a participant.

12. I first learned of the antitrust litigation in may [sic] 1984 when I red [sic] the article in the newspaper about the outcome of the trial. I had remembered that our loans were based on the prime rate of FIBO and called to find out what was going on.

13. In 1984, to attempt to avoid foreclosure, Plaintiffs submitted loan packages to every bank in town. Each one denied credit to Plaintiff for various reasons. The banks were uniformly vague about the reasons except a few, such as Mike Van at Alaska Continental Bank who specifically stated that the lawsuit with ASD would have

to go away before any money would be lent. National Bank of Alaska was the funniest. Jan Sieberts signalled the loan officer in my preence [sic]. Thereafter I was put off by Mr. Struts (Sp?) and finally denied credit. Alaska Statebank [sic] strung us along for several months before turning us down. Clearly all had communicated with FIBA. FIBA had supposedly related to Rogers and Babler or MAPCO Alaska Inc. employees as early as 1982 the falsehood that Plaintiffs were nearly bankrupt. Alaska State Bank is the only Alaska bank to which I have first hand knowledge tht [sic] they discounted below thier [sic] prime rate. I never found out how they defined their prime rate however. They discounted one pont [sic] below prime to the City of Unalaska on a School and Swimming Pool interim loan for which plaintiffs were the architects. I also learned from Moody's Industrial File that Don Mellish, former Chairman of the Board of National Bank of Alaska was a Board Member of Mapco Inc. parent of MAPCO Alaska Inc. during this period.

15. During the course of the troubles with FIBA, they notarized a Uniform Commercial Code filing signature by myself by affixing a notary that had not even been issued at the time the signature was affixed. This was reported to the Alaska State Troopers who claimed it was a civil matter.

16. Each month we received a loan statement through the mail with the interim finance interest rate for that month printed on it. That rate, after telephoninf [sic] FIBO was always 3.5 points above the prime rate given us by FIBO for the particular month. Thus, as the prime rate had been admittedly discounted, said prime rate cannot

be the prime rate charged FIBO's most credit worthy borrowers.

17. I learned from counsel for plaintiffs in Wilcox case that FIBO had made some loans at a rate as low as 6%. This could have been 7 to 8 points below the prime rate or more during the time that the loans were in place since the prime rate was as big as 21% at one point.

18. While designing a branch bank for FIBA in early 1983, we met with a representative of FIBC who advised FIBA on the layout FIBC wanted, signage, and other features. FIBC clearly was involved with the design and had decision making control over it to an unknown amount.

FURTHER YOUR AFFIANT SAYETH NAUGHT

/s/ Michael E. Plunkett  
Michael E. Plunkett

Subscribed to and sworn before me this 25 day of April 1988.

/s/                       
Notary Public for Alaska  
My Commission Expires  
                    

\_\_\_\_\_

APPENDIX J

Michael E. Plunkett, Pro Se  
600 Barrow, Suite 200  
Anchorage, Alaska 99501  
(907) 276-4939

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett, et al,	)
Plaintiffs.	)
v.	)
First Interstate Bank of	)
Alaska, formerly, Alaska	)
Bank of Commerce, et al,	)
Defendants.	)

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CASE NO. A 84-387 Civil

AFFIDAVIT OF CHARLES HOMAN

STATE OF ALASKA	)	
	)	s.s.
THIRD JUDICIAL DISTRICT	)	

Charles Homan, being duly sworn, deposes and states:

1. I am Charles Homan, have personal knowledge of the following facts, am competent to testify as to the following facts and if called upon to testify at a hearing or at trial would testify as follows:

2. I was Vice President of Alaska Bank of Commerce in Anchorage, Alaska, during the period in which Lane + Knorr + Plunkett Investment Company, an Alaska General Partnership consisting of Michael Edward Plunkett,

and Donald R. Knorr applied for and obtained interim financing for the construction of an Office -Condominium complex known as the 600 Barrow Building located on Block 110, Lot 1, of the Original Townsite of Anchorage, Alaska.

3. During the time in which Lane + Knorr + Plunkett Investment Company was applying for and secured interim financing for the 600 Barrow Project I was the Commercial Loan Officer at Alaska Bank of Commerce most familiar with the project and the loans.

4. I was employed as Vice President of Alaska Bank of Commerce when it changed its name to First Interstate Bank of Alaska in 1983.

5. I left employment of First Interstate Bank of Alaska in February, 1984.

6. Lane + Knorr + Plunkett Investment Company executed two interim finance agreements entitled "Deed of Trust Note" with Alaska Bank of Commerce. The First Deed of Trust Note was in the loan amount of \$1,667,200, and was originally due and payable on June 15, 1981. A copy is attached hereto as Exhibit 1, The second Deed of Trust Note was in the amount of \$355,600.00 and was executed on February 11, 1982. A copy of the Second modification to Deed of Trust Note is attached hereto as Exhibit 2.

7. Exhibits 1 and 2 hereto were standard Deed of Trust Note forms used by Alaska Bank of Commerce. The forms used in the preparation of Exhibit 1 and 2 hereto. Exhibits 1 and 2 hereto were prepared for signature by Lane + Knorr + Plunkett Investment Company under my supervision.



9. I executed loan documents on behalf of Alaska Bank of Commerce in conjunction with the loans secured by the Deed of Trust Notes contained in Exhibits 1 and 2 hereto and was authorized to do so by the Board of Directors of Alaska Bank of Commerce.

7. Both Exhibit 1 and Exhibit 2 based the rate of interest to be charged on three and one half points above the prime rate charged by the First National Bank of Oregon, subsequently called the First Interstate Bank of Oregon. The "prime rate" was defined in the Deed of Trust Notes as "the rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON to its most credit - worthy borrowers during the term of this note. The Deed of Trust Notes were set up in this fashion so that if First Interstate Bank of Oregon, formerly First National Bank of Oregon, were to participate with Alaska Bank of Commerce in any of many commercial interim finance loans being made during the 1980-1982 period, the interest rates would correspond with the published prime rate of First National Bank of Oregon, now First Interstate Bank of Oregon.

8. During the 1980 through 1984 period Alaska Bank of Commerce (later called First Interstate Bank of Alaska) participated with First Interstate Bank of Oregon, formerly First National Bank of Oregon in interim finance loans. I have no specific recollection whether Exhibits 1 and 2 hereto were loans in which First National Bank of Oregon and/or First Interstate Bank of Oregon participated with Alaska Bank of Commerce, (later called First Interstate Bank of Alaska).



7. While still employed by First Interstate Bank of Alaska, I learned that a consumer group had brought a class action suit against First Interstate Bank of Oregon claiming that First Interstate Bank of Oregon had discounted loans below their published prime interest rate.

FURTHER YOUR AFFIANT SAYETH NAUGHT

/s/ Charles Homan  
Charles Homan

Subscribed and sworn to before me this 19th day of September, 1988.

/s/ Sam M. Dua  
Notary Public for Alaska  
My Commission Expires  
5-14-92

*Certificate of Service*

I hereby certify that on 19 September, 1988 I caused to be hand delivered a copy of the above Affidavit with Exhibits to the offices of John Hedlund and James Gorski, counsel of record in this case.

/s/ Michael E. Plunkett  
Michael E. Plunkett, Pro Se

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EXHIBIT 1

DEED OF TRUST  
NOTE

US \$1,667,200.00

Anchorage, Alaska

FOR VALUE RECEIVED, the undersigned jointly and severally promise(s) to pay to, or to order

## ALASKA BANK OF COMMERCE

a corporation organized under the laws of the State of Alaska, at its office in Anchorage, Alaska or at such other place as the holder may designate in writing, the principal sum of ONE MILLION SIX HUNDRED SIXTY-SEVEN THOUSAND TWO HUNDRED AND NO/100 with interest from date hereof until paid at the rate of TWELVE per cent 12.00% per annum, but not less than the prime rate plus THREE & ONE-HALF per cent 3.50% (Computed on the basis of a 365 day year and computed on balances remaining from time to time unpaid). The prime rate is defined as the prime rate being charged by the FIRST NATIONAL BANK OF OREGON, PORTLAND, OREGON to its most credit-worthy borrowers during the term of this note. The interest rate shall be adjusted on the first day of the month following a prime rate change by the bank. The prime rate as of the date of this note is ———. Interest hereon [sic] shall be paid monthly on the last day of each calender month during the term hereof. In the event interest is not paid on the last day of a calendar month, said interest shall then be added to the principal balance and become a part thereof, and thereafter bear interest at the same rate as the principal. Payment of the entire indebtedness evidenced by this note shall be due and payable on the 15th day of JUNE, 1981. This note is secured by a deed of trust on even date herewith on property situated in the ANCHORAGE Recording District, THIRD Judicial District, State of Alaska.

In the event of default in any of the foregoing payments or in any of the agreements contained in the deed of trust securing this note, the principal sum then remaining unpaid together with accrued interest thereon shall

forthwith become due and payable at the election of the holder of this note. Failure to exercise such option shall not waive the right to exercise it upon any continuing or subsequent default. The under-signed jointly and severally agree to pay all costs and expenses, including attorney's fees, incurred by the holder of this note in any suit or proceeding instituted upon this note. In the event of default in any of the foregoing payments, the holder of this note may at its option foreclose the deed of trust securing this note, summarily or by suit.

The makers and each endorser of this note jointly and severally waive diligence, presentment protest and demand, and notice of protest, dishonor and non-payment of this note, expressly agree that this note or any payment hereunder may be extended from time to time by any holder hereof, and consent to the acceptance of further security for this note, without affecting the liability of any maker or endorser, guarantor and surety of this note jointly and severally waive the right to plead any statute of limitation as a defense in collection of this note for foreclosure of any instrument securing this note.

THIS NOTE is made with reference to and is to be construed in accordance with the laws of the State of Alaska.

LANE + KNORR +  
PLUNKETT INVESTMENT  
COMPANY, dba LKP  
INVESTMENT COMPANY a  
partnership consisting of Mic-  
hael E. Plunkett and Donald  
R. Knorr.

/s/ Michael E. Plunkett  
Michael E. Plunkett,  
individually

by: /s/ Michael E. Plunkett  
Michael E. Plunkett,  
Partner

/s/ Donald R. Knorr  
Donald R. Knorr,  
individually

by: /s/ Donald R. Knorr  
Donald R. Knorr,  
Partner

## EXHIBIT 2

## MODIFICATION OF DEED & TRUST NOTE

FOR VALUABLE CONSIDERATION, it is hereby agreed by and between Lane+Knorr+Plunkett Investment Company a/k/a LKP Investment Company a Partnership consisting of Michael E. Plunkett and Donald R. Knorr FIRST PARTY, and ALASKA BANK OF COMMERCE, an Alaska Banking Corporation, Second Party, that that certain Promissory Note dated 2/11/82, in the amount of \$355,600.00 plus interest at Three & One Half percent (3.50%), Over Prime Fully floating of FIBO Floor 15.0% payable Interest Monthly and have a remaining balance of \$354,170.92 with interest paid to, ——— secured by a Deed of Trust dated 2/11/82, recorded 2/22/82, in book 701, Page 0049, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska, and covering the following described real property:

SEE ATTACHED LEGAL DESCRIPTION  
EXHIBIT "A", (CONSITING [sic] OF TWO  
PAGES, PARCEL A THRU [sic] G).

is hereby amended in the following respect, to wit:

ALL REMAINING PRINCIPAL AND INTEREST  
OWED UNDER THIS NOTE OR ANY DOCU-  
MENT SECURING IT PAYMENT SHALL BE  
DUE AND PAYABLE IN FULL ON OR BEFORE  
12/31/82.

It is further agreed that a copy of this agreement shall  
be attached to said note. In all other respects the Note  
and Deed of Trust securing the note are hereby ratified  
and confirmed.

IN WITNESS WHEREOF the Parties hereto have  
hereunder set their hands this \_\_\_\_ day of October, 1982.

ALASKA BANK OF  
COMMERCE

By \_\_\_\_\_  
Charles E. Homan  
Vice President

L A N E + K N O R R +  
PLUNKETT INVESTMENT  
COMPANY a/k/a LKP  
INVESTMENT COMPANY, a  
Partnership consisting of Mic-  
hael E. Plunkett and Donald  
R. Knorr

By /s/ Michael E. Plunkett  
Michael E. Plunkett,  
Partner

By /s/ Donald R. Knorr  
Donald R. Knorr,  
Partner

By /s/ Michael E. Plunkett  
Michael E. Plunkett,  
Individually

By /s/ Donald R. Knorr  
Donald R. Knorr,  
Individually

---

APPENDIX K

John S. Hedland, Esq.  
HEDLAND, FLEISCHER, FRIEDMAN,  
BRENNAN & COOKE  
1227 West 9th Avenue, Suite 300  
Anchorage, Alaska 99501-3218  
907/ 279-5528

Attorneys for Defendant  
FIRST INTERSTATE BANCORP  
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT;	)	
LANE + KNORR + PLUNKETT,	)	
Architects and Planners;	)	Case No.
LANE + KNORR + PLUNKETT,	)	A84-387 CIV
Investment Company, and all	)	
others similarly situated,	)	AFFIDAVIT OF
	)	EDMUND J.
Plaintiffs,	)	BOCK
vs.	)	
FIRST INTERSTATE BANK OF	)	
ALASKA, formerly, Alaska	)	
Bank of Commerce; FIRST	)	
INTERSTATE BANCORP; FIRST	)	
INTERSTATE BANK OF OREGON,	)	
formerly First National Bank	)	
of Oregon; and unknown	)	
defendants DOES 1 through 100,	)	
Defendants.	)	

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STATE OF OREGON	)	
	)	ss.
County of Multnomah	)	

Edmund J. Bock, first being duly sworn, deposes and states:

1. I am an Assistant Vice President of First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and since March, 1987, I have been the manager of the Financial Institutions Group of this Bank's Corporate Banking Group. In my position as manager of the Financial Institutions Group I am the custodian of the majority of the correspondent bank files of this Bank, including the correspondent bank file relating to Alaska Bank of Commerce, nka First Interstate Bank of Alaska. I have reviewed this Bank's entire correspondent banking file relating to Alaska Bank of Commerce, nka First Interstate Bank of Alaska and if called as a witness at trial, could competently testify to the following:

2. As a correspondent bank of this Bank, Alaska Bank of Commerce obtained a federal funds borrowing line, also referred to as an overnight borrowing line, from this Bank on March 17, 1981. This line continued in place until March 31, 1985 when it was terminated. This facility enabled Alaska Bank of Commerce to borrow funds from First Interstate Bank of Oregon on an overnight basis. Banks use a facility like this for short term liquidity purposes, for example, to enable the bank to borrow on an overnight basis to meet Federal Reserve Bank reserve requirements.

3. This Bank had no means and could have no means of knowing for what purposes Alaska Bank of Commerce was using the borrowed funds. Further, due to the short term overnight nature of the borrowing this Bank could never have tied repayment of these overnight



borrowings to repayment of any subsequent loans made by Alaska Bank of Commerce to its Borrowers.

4. The interest rate charged by First Interstate Bank of Oregon to Alaska Bank of Commerce on the short term overnight borrowings is what is sometimes referred to as the Federal Funds rate. This rate is not in any way pegged to the Bank's prime rate.

5. It is very common and is in fact necessary for the efficient operation of the banking system in the United States for totally unrelated banks to have correspondent relationships with one another. For instance, First Interstate Bank of Oregon, N.A. at the present time has a correspondent relationship with approximately 39 independent non-affiliated banks nationwide.

FURTHER AFFIANT SAYETH NOT.

DATED: 4-28-88

/s/ Edmund J. Bock  
Edmund J. Bock

Subscribed and sworn to before me this 28 day of April, 1988.

/s/ Rebecca J. Whitney

Notary Public for Oregon  
REBECCA J. WHITNEY  
My Commission Expires:  
NOTARY PUBLIC OREGON  
My Commission Expires 10-12-90

---

APPENDIX L

John S. Hedland, Esq.  
HEDLAND, FLEISCHER, FRIEDMAN,  
BRENNAN & COOKE  
1227 West 9th Avenue, Suite 300  
Anchorage, Alaska 99501-3218  
907/279-5528

Attorneys for Defendants  
FIRST INTERSTATE BANCORP  
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT; )  
LANE + KNORR + PLUNKETT, )  
Architects and Planners; )  
LANE + KNORR + PLUNKETT, )  
Investment Company, and )  
all others similarly situated, )

Plaintiffs, )

vs. )

FIRST INTERSTATE BANK OF )  
ALASKA, formerly, Alaska Bank of )  
Commerce; FIRST INTERSTATE )  
BANCORP; FIRST INTERSTATE )  
BANK OF OREGON, formerly, )  
First National Bank of Oregon; and )  
unknown defendants DOES I )  
through 100, )

Defendants. )

Case No.  
A84-387 Civ

AFFIDAVIT OF  
KENNETH K.  
KAUFMANN

STATE OF CALIFORNIA )

COUNTY OF LOS ANGELES )

SS.

KENNETH K. KAUFMANN, being duly sworn, deposes and states:

1. I am the Corporate Secretary of First Interstate Bancorp, a bank holding company and have previously executed an Affidavit in this action.

2. I do not know nor am I related to the "Frank Kauffman" identified in the Complaint as an Employee of First Interstate Bank of Alaska or any other person named "Frank Kauffman".

FURTHER AFFIANT SAITH NOT.

DATED: May 2, 1988

/s/ Kenneth K. Kaufmann  
Kenneth K. Kaufmann

SUBSCRIBED AND SWORN TO before me this 2nd day of May 1988.

/s/ Olga Perez  
Notary Public in and for  
the State of California  
My commission expires:  
9-20-89

SEAL

The undersigned hereby swears that on the 5th day of May, 1989 the attached documents were mailed to the attorneys of record.

/s/ Judith M. Perry  
Subscribed and sworn to before the date last written.

/s/ Debra A. Kurgynski  
Notary Public  
My Commission Expires 6/22/88

---

APPENDIX M

John S. Hedland, Esq.  
HEDLAND, FLEISCHER, FRIEDMAN,  
BRENNAN & COOKE  
1227 West 9th Avenue, Suite 300  
Anchorage, Alaska 99501-3218  
907/279-5528

Attorneys for Defendants  
FIRST INTERSTATE BANCORP  
and FIRST INTERSTATE BANK OF OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL E. PLUNKETT; )  
LANE + KNORR + PLUNKETT, )  
Architects and Planners; )  
LANE + KNORR + PLUNKETT, )  
Investment Company, and )  
all others similarly situated, )

Plaintiffs, )

vs. )

FIRST INTERSTATE BANK OF )  
ALASKA, formerly, Alaska Bank of )  
Commerce; FIRST INTERSTATE )  
BANCORP; FIRST INTERSTATE )  
BANK OF OREGON, formerly, )  
First National Bank of Oregon; and )  
unknown defendants DOES I )  
through 100, )

Defendants. )

Case No.  
A84-387 Civ

AFFIDAVIT OF  
LEE C. NUSICH

STATE OF OREGON )

) SS.

County of Multnomah )

Lee C. Nusich, first being duly sworn, deposes and states:

1. I am an Associate General Counsel for First Interstate Bank of Oregon, N.A. fka First National Bank of Oregon and have held that position since November 1, 1982.

2. First Interstate Bank of Oregon, N.A., was sued in Lane County Circuit Court, State of Oregon by Robert P. McWhorter in February of 1983. A copy of McWhorter's First Amended and Supplemental Complaint which was filed in that proceeding and which sets forth McWhorter's theory of the case is attached hereto as Exhibit A and hereby made a part hereof.

3. This case continued in Lane County Circuit Court until it was finally dismissed with prejudice pursuant to settlement on or about April 27, 1987. The case was dismissed by the Circuit Court without the preparation of a formal Judgment of Dismissal. The Circuit Court did, however, send to all parties its official notice that Judgment of Dismissal was entered on April 27, 1987. A copy of that notice from the Lane County Circuit Court evidencing the dismissal having been entered in the records of the Lane County Circuit Court is attached hereto as Exhibit B and hereby made a part hereof.

FURTHER AFFIANT SAYETH NOT.

DATED: April 29, 1988

/s/ Lee C. Nushich  
Lee C. Nusich

Subscribed and sworn to before me this 29 day of  
April, 1988.

/s/ Rebecca J. Whitney  
Notary Public for Oregon  
My Commission Expires: 10-12-90

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EXHIBIT A

IN THE CIRCUIT COURT OF THE STATE OF  
OREGON FOR LANE COUNTY

ROBERT P. McWHORTER,	)	Case No.
	)	16-83-01030
Plaintiff,	)	FIRST AMENDED AND
vs	)	SUPPLEMENTAL
	)	COMPLAINT
FIRST INTERSTATE BANK	)	(Breach of Contract;
OF OREGON, N.A., a	)	Breach of Implied
national banking	)	Contract; Outrageous
association,	)	Conduct; Deceit)
Defendant.	)	
	)	

---

Plaintiff Robert P. McWhorter, for his first separate  
claim for relief, alleges:

I

(Breach of Contract)

At times material herein, Plaintiff was a resident of  
Eugene, Lane County, Oregon.

II

Defendant is, and at all times herein mentioned, was a national banking association, existing under the laws of the United States, doing business in the County of Lane, State of Oregon, under the laws of the State of Oregon.

III

On June 11, 1969, Plaintiff and Defendant mutually agreed that Plaintiff should work for Defendant and that Defendant should employ Plaintiff. Plaintiff commenced working for Defendant on October 6, 1969. On January 25, 1982, Plaintiff was employed by Defendant as a Vice President and Branch Manager VII, and employee with a grade ranking of 18.

IV

At all times mentioned herein Defendant had in effect published personnel policies, which provided that the policies applied to any employee in that bank and defined employee as officer and non-officer alike, and further, that every employee considered for dismissal would receive completely fair and equitable treatment. At all times mentioned herein Defendant had in effect published procedures to be followed as a precondition to termination and before the termination would become effective. Defendant continued to publish its personnel policies and to amend the personnel policies at all times herein and expected Plaintiff to be bound thereby.



V

At all times mentioned herein the policy and procedures above constituted conditions of employment agreed upon between Defendant and Plaintiff. These conditions restricted Defendant's right to terminate Plaintiff's employment. These conditions were part of the consideration for Plaintiff's continuing employment services.

VI

Plaintiff duly performed all work required of him by Defendant and complied with all agreed conditions of employment.

VII

On January 25, 1982, without complying with the above-described policy and procedure, Defendant terminated Plaintiff's employment. Plaintiff was not discharged by act of the Board of Directors of Defendant, and Plaintiff, as an employee of grade 18, was not afforded the opportunity, in accordance with Defendant's published policy manual, to appear before an evaluation committee which is generally comprised of the Chairman of the Board, Vice Chairman of the Board, President, and Executive Vice President, although such appearance was requested by Plaintiff.

VIII

Thereafter, on April 30, 1982, Defendant discontinued Plaintiff's salary and benefits.

IX

Defendant breached its employment agreement with Plaintiff by terminating his employment and discontinuing his salary and benefits without first complying with its policies and procedures for effecting the dismissal of an employee. Defendant did not treat Plaintiff fairly and equitably in dismissing him, nor did it determine that he had been treated fairly and equitably prior to dismissing him.

X

On or about January 25, 1982, and at various times thereafter, Plaintiff notified Defendant of this breach.

XI

Since April 30, 1982, Plaintiff has continuously held himself out as able and willing to continue employment services for Defendant, but Defendant has refused to reinstate him. Plaintiff has also requested that Defendant comply with its procedures and policies for effecting termination, but it has refused.

XII

At the time of his termination, Plaintiff was paid an annual salary of \$46,000, and received benefits with the then potential value of approximately \$500,000 all as consideration for his employment services.

XIII

As a result of the conduct of Defendant and its officers, Plaintiff has suffered financial losses and expenses. The losses include lost wages while seeking replacement employment, lost future income in obtaining less remunerative replacement employment, and depletion of his savings. The expenses include the costs of locating and obtaining replacement employment, commuting to the location of the replacement employment, maintaining a separate residence there, and borrowing funds. These losses and expenses total \$868,000.

XIV

Defendant's conduct as alleged hereinabove has been willful, wanton, malicious, and in disregard of societal interests and the rights of the Plaintiff. For this conduct, Defendant should be assessed punitive damages in the sum of \$1,500,000.

XV

By virtue of Defendant's breach of the employment agreement and its continued refusal to reinstate Plaintiff, or comply with its policies and procedures, Plaintiff has been generally damaged in the sum of \$1,404,000 and will continue to be damaged.

(Breach of Implied Contract)

For a second separate claim for relief, Plaintiff alleges:

I

Re-alleges paragraphs I through VIII and X through XV of the first claim for relief.

II

Defendant breached its employment agreement with Plaintiff by terminating his employment and discontinuing his salary and benefits without just cause and: (1) without first determining whether facts constituting just cause existed, (2) without first complying with its published policies and procedures for determining whether facts constituting just cause existed, and, for effecting the dismissal of an employee, (3) without first advising Plaintiff that his performance of the duties and responsibilities assigned him was unsatisfactory and that termination was being considered, and (4) without first affording him an opportunity to establish that no just cause existed or to improve his performance, having afforded other employees similarly situated the opportunity to do so. The published personnel policies provide that the requirements of this paragraph II (1), (2), (3), and (4) are to be complied with by the Defendant prior to Plaintiff's dismissal as an employee.

(Outrageous Conduct)

For a third separate claim for relief, Plaintiff alleges;

I

Re-alleges paragraphs, I, II and III of the first claim for relief.

## II

Defendant consistently commended Plaintiff in annual evaluations of his performance of the responsibilities and duties assigned him. He was successively promoted from assistant cashier to Assistant Manager to assistant Vice President to Vice President & Manager, going from grade 7 to grade 18, all within an exceptionally short period of time. He received corresponding increases in salary, as well as increases in responsibility and duty. Defendant led Plaintiff to believe that his performance and advancement so far had been prodigious, and that he would continue to be advanced in position, responsibility, duty and salary. Plaintiff was in good health, was thirty-seven (37) years of age, and had expected to work for defendant until his retirement. Plaintiff's last performance evaluation took place effective July 1, 1981 and stated, among other things:

"That the Eugene Main Branch is the largest branch in region 2 and requires considerable amount of managerial skill and talent which bob possesses . . . This is evidenced by the very aggressive and successful calling program and has been responsible for developing . . . new customer loans and . . . new customer deposits, plus substantial business with the existing customers since January, 1981. Bob's calls are documented outside . . . which attest to his active calling posture. It is through demonstrated leadership ability and proper delegation that he enjoys the respect of his staff and promotes good customer service in the Eugene area."

III

On January 25, 1981, Bill Davidson and Robert Derby, senior officers of Defendant corporation, having previously met with each other and determined to terminate Plaintiff, met with Plaintiff and informed him that he was relieved of his position of employment with Defendant without following published personnel policies.

IV

Defendant had not previously indicated to Plaintiff that Defendant considered Plaintiff's job performance to be unsatisfactory nor that Defendant contemplated relieving him of his position as branch manager, vice president or employee grade. On the contrary, Plaintiff's immediate prior performance evaluation of July 1, 1981 commended his performance.

V

The reasons given to Plaintiff by Davidson and Derby at the January 25th meeting for the decision to relieve him were untrue or unfounded as related to Plaintiff's job performance. Plaintiff was given no prior notice of the reasons nor an opportunity to refute the reasons or challenge the decision, nor an opportunity to correct the alleged failure of performance, which opportunity had been given to another individual.

VI

At the January 25th meeting, Davidson and Derby advised Plaintiff that his employment was not terminated

but only his position as branch manager and that Defendant would attempt to relocate him in a comparable position in Defendant corporation or with an affiliated corporation. In fact, Plaintiff's employment had been terminated at the January 25th meeting. Defendant had previously determined that the discharge was irrevocable, and Defendant did not intend to relocate or reinstate him, although it led Plaintiff to believe otherwise on several occasions. Defendant attempted to solicit the assistance of a senior vice president to obtain consideration under the policy manual and was summarily refused and advised that the decision was that vice president's and it was final.

## VII

Defendant's conduct was willful and in violation of its published policies and procedures for treatment of employees on a fair basis, equally, and effecting the dismissal of an employee of Plaintiff's grade level.

## VIII

As a result of Defendant's conduct, Plaintiff has suffered severe emotional distress, including shock, disappointment, humiliation, anxiety and worry. Plaintiff, in addition to the monetary losses herein alleged, has also suffered losses of self-esteem and self-confidence.

## IX

By virtue of Defendant's conduct Plaintiff has been damaged in the amount of \$1,500,000.



X

Defendant's conduct was intended to inflict severe emotional distress or was reckless of the conduct's predictable effects on Plaintiff. As a consequence, Plaintiff is entitled to the sum of \$1,500,000 in punitive damages.

(Deceit)

For a fourth separate claim for relief, Plaintiff alleges:

I

Re-alleges paragraphs I, II, III, X and XII of the first claim for relief.

II

On January 25, 1982, Bill Davidson and Robert Derby, senior officers of Defendant corporation, met with Plaintiff and informed him that he was relieved of his position of employment with Defendant.

III

During the period of Plaintiff's employment, Defendant represented to Plaintiff that he would be treated fairly and equitably in all facets of the employment relation, and especially in the event of the termination of his employment. Defendant further represented that it would comply with published policies and procedures in the event of termination of Plaintiff's employment. Finally, Defendant or its officers represented to Plaintiff at the January 25th meeting that his employment was not then

terminated and that Defendant would attempt to relocate him in another position within Defendant corporation or with an affiliated corporation. Defendant intended Plaintiff to rely on these representations.

#### IV

These representations were false in that Defendant did not, and did not intend to, comply with its published policies and procedures and did not intend to treat Plaintiff equitably and fairly in terminating his employment; in that Defendant did not, and did not intend to, follow its published procedures and policies in effecting his dismissal and did intend to rely on 12 U.S.C., Section 24 (Fifth) which it alleges allows Plaintiff to be dismissed at will; in that Plaintiff's employment was in fact terminated at the January 25th meeting. The termination was irrevocable, and Defendant did not, and did not intend to, relocate or reinstate Plaintiff, nor did it intend to follow its manual with reference to the Plaintiff after he became an officer, and Defendant at the time it induced Plaintiff to become an officer and published its personnel manual and intended to, and did, assert U.S.C. Section 24 (Fifth) and had no intention of being bound, despite its assertions that it applied to all its employees when it published its manual, officers and non-officers alike.

#### V

Plaintiff was at all times material unaware that Defendant did not intend to treat him in accordance with its published policy manual or to treat him equitably and fairly in effecting his dismissal, that Defendant did not

intend to follow its procedures and policies for effecting his dismissal, nor that the Defendant did intend to rely on 12.U.S.C. Section 24 (Fifth), when his employment was terminated at the January 25th meeting, and that Defendant did not intend to relocate or reinstate him.

## VI

As a result of the conduct of Defendant and its officers, Plaintiff, by virtue of his reliance on the truthfulness of Defendant's representations, has suffered financial losses and expenses. The losses include lost wages while seeking replacement employment, lost future income in obtaining less remunerative replacement employment, and depletion of his savings. The expenses include the costs of locating and obtaining replacement employment, commuting to the location of the replacement employment, maintaining a separate residence there, and borrowing funds. These losses and expenses total \$868,000.

## VII

As a result of Defendant and its officers before his termination and subsequent thereto, Plaintiff has suffered severe emotional distress, including shock, disappointment, humiliation, anxiety and worry. Plaintiff has also suffered losses of self-esteem and self-confidence, as well as damage to his reputation.

VIII

By virtue of his reliance upon the truthfulness of Defendant's representations, Plaintiff has been generally damaged in the amount of \$1,500,000.

IX

Defendant and its officers made the representations maliciously, wilfully or recklessly, in complete disregard for the predictable detrimental consequences for Plaintiff in the event of his reliance. Therefore, Plaintiff is entitled to the sum of \$1,500,000 in punitive damages.

WHEREFORE, Plaintiff demands judgment:

1. In favor of Plaintiff in the amount of \$868,000 in special damages, \$1,404,000 in general damages and \$1,500,000 in punitive damages on the first claim for relief;
2. In favor of Plaintiff in the amount of \$868,000 in special damages, \$1,404,000 in general damages and \$1,500,000 in punitive damages on the second claim for relief;
3. In favor of Plaintiff in the amount of \$1,500,000 in general damages and \$1,500,000 in punitive damages on the third claim for relief;
4. In favor of Plaintiff in the amount of \$868,000 in special damages, \$1,500,000 in general damages and \$1,500,000 in punitive damages on the fourth claim for relief;
5. For Plaintiff's costs and disbursements incurred herein;

6. For such other and further relief as the court may deem just and equitable.

LUVAAS, COBB, RICHARDS &  
FRASER, P.C.  
Attorneys for Plaintiff

By: \_\_\_\_\_  
ROBERT H. FRASER  
OSB NO. 59033

\* \* \*

I certify that the foregoing First Amended and Supplemental Complaint, is a true, exact and complete copy of the original.

DATED: May 20, 1983 /s/ Robert H. Fraser

One of Attorneys for Plaintiff

\* \* \*

\_\_\_\_\_  
EXHIBIT B

CIRCUIT COURT FOR LANE COUNTY  
Second Judicial District

TO: Balmer Thomas A -ot  
222 Sw Columbia Street  
Portland Or 97201

In accordance with ORCP 70B(1) you are hereby notified  
that judgment was entered in the case noted below.

MCWHORTER ROBERT P/FIRST INTERSTATE BANK  
OF OR NA

CASE NO.: 168301030

DATE FILED: 04/27/87

DATE ENTERED: 04/27/87

JUDGE: Maurice K. Merten

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## APPENDIX N

## Statutes and Civil Rules

## 15 U.S.C. Sec. 1

**§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any



combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

28 U.S.C. Sec. 1254

**§ 1254. Courts of appeals; certiorari; appeal; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

18 U.S.C. Sec. 1961

**§ 1961. Definitions**

As used in this chapter -

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664

(relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing

with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transaction Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal

law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

**FEDERAL RULES OF CIVIL PROCEDURE****Rule 56. Summary Judgment**

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearings of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.



**(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(as amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

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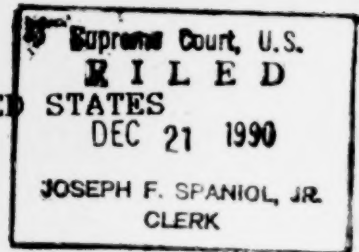




NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990



MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND

PLANNERS; LANE + KNORR + PLUNKETT,

INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE

CORPORATION, RECEIVOR OF FIRST INTERSTATE

BANK OF ALASKA; FIRST INTERSTATE

BANCORPORATION; FIRST INTERSTATE BANK OF OREGON,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MOTION TO VACATE ORDER DENYING PETITION FOR A  
WRIT OF CERTIORARI FOR PROCEDURAL ERROR

Michael E. Plunkett, Pro Se  
331 8th St  
Manhattan Beach, Cal. 90266  
(213) 379-9848

DECEMBER 12, 1990.

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MOTION TO VACATE ORDER DENYING PETITION FOR A  
WRIT OF CERTIORARI FOR PROCEDURAL ERROR

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Michael E. Plunkett, Pro Se  
331 8th St  
Manhattan Beach, Cal. 90266  
(213) 379-9848

DECEMBER 12, 1990.

Motion by Petitioner Michael E. Plunkett  
to Vacate Order Denying Return for Writ of  
Certiorari for Procedural Error (not a  
Petition for Rehearing)

List of Parties: see List of Parties in  
Respondent First Interstate Bancorp and  
First Interstate Bank of Oregon Opposition  
Brief, pages ii-vii.

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MOTION TO VACATE ORDER DENYING  
PETITION FOR A WRIT OF CERTIORARI FOR  
PROCEDURAL ERROR (NOT A PETITION FOR  
REHEARING)

Comes now Petitioner and moves this court to vacate its order denying Petition for Writ of Certiorari for procedural error. This Motion is accompanied by a Memorandum in support. This is not a Petition for Rehearing. A separate Conditional Petition for Rehearing is being filed should this Motion be denied.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Movant seeks vacation of order denying Petition for Writ of Certiorari because Court prematurely distributed the Petition prior to receipt of Opposition Briefs. As a result, the Court considered the Petition probably without knowledge of existence of an Opposition Brief and without benefit of fact that Respondents other than the Solicitor General felt the Petition had sufficient merit to warrant

preparation of an Opposition Brief. As a result of the premature distribution the petitioner was not given even a slight opportunity to prepare and file a Reply and/or Supplemental Brief before the Petition was denied on November 26, 1990. Petitioner seeks vacation to enable a small amount of time to submit a Reply Brief to Opposition filed by Respondents First Interstate Bancorp and First Interstate Bank of Oregon.

## II. FACTS AND PROCEEDINGS.

Petition was timely filed October 16, 1990 and served on Respondents First Interstate Bancorp ("FIBC"), First Interstate Bank of Oregon ("FIBO"), and Federal Deposit Insurance Corporation ("FDIC") as receiver for First Interstate Bank of Alaska ("FIBA"), formerly Alaska Bank of Commerce ("ABC"). On October 24, 1990, this Court directed Petitioner to

serve the Solicitor general, which was accomplished on October 30, 1990. On November 6, 1990 Solicitor General hand delivered a Waiver to the court without any certificate of service to any Respondents, merely copying Petitioner with an unsigned copy of the waiver. Said waiver made no mention whatsoever that the Solicitor General was appearing on behalf of FDIC per Rule 9, or that Solicitor General was going to be the only Counsel appearing on behalf of Federal Deposit Insurance Corporation ("FDIC").

The Court Clerk, when reading the improperly formed waiver, was apparently led to believe there were no other Respondents other than Solicitor General and therefore distributed the Petition on November 7, 1990. (Supreme Court Record, "SCR" item 4). This premature distribution was a clear violation to Supreme Court Rule 15.1.



FIBO and FIBC filed their combined (hereafter collectively referred to as "FIBO" unless noted otherwise) Opposition brief on November 15, 1990, received by the Court November 19, 1990 and distributed November 21, 1990 ("SCR" 4,5). No copy of certificate of service was mailed to Petitioner. SCR 5 indicates Respondent served FDIC and the Solicitor General not knowing Government had waived its right to respond. During this time the Court was on its Thanksgiving recess from November 14 - 25, (Supreme Court Bulletin, 9/17/90, page 8031) and staff had one working day, November 23, 1990, to review Opposition Brief prior to Court denying Petition on November 26, 1990.

As a result of Supreme Court Rule 29.4(a) Petitioner was awaiting an Opposition due November 30, 1990, prior to preparing a Reply. The denial was received November 29, 1990 (a full moon).

The prejudicial effect of the improper and erroneously premature distribution of the Petition was to short circuit any reasonable attempt to file a reply brief. A reply brief was absolutely essential to point out to the court the falsehoods propagated by Respondents FIBO and FIBC and to demonstrate with further excerpts from the record that more evidence existed in the Record at the time summary judgment was ordered in District Court than the FIBO had included in its Opposition Appendix. The reply was further necessary to point out the fallacious legal citations and authorities regarding interpretation of Anderson v. Liberty Lobby Inc. 477 US 242, 106 S.Ct. 2505, 19 L.Ed2d 202(1986) ("Anderson") , on summary judgment evidentiary requirements and other false arguments .

Petitioner's wife called the Court on November 30, 1990 to obtain copies of all

documents on file in the case. The clerk, claimed the only documents on file in the case were the Petition and Opposition!. On Monday, December 3, 1990, Petitioner called the clerk, Ms. Teckeley, who claimed the following:

(1) Solicitor General represented FDIC

(2) Opposition Brief had been received on November 5, 1990 and the case had been distributed on November 7, 1990.

Petitioner was then put on hold and out off. A return call placed Petitioner in contact with a Mr. Gullickson who gave a different set of facts as follows:

(a) Petition was distributed on November 7, 1990, prior to time for receipt of Opposition -brief from Respondents FIBO or FIBC.

(b) Opposition brief was received November 19, 1990 and distributed November

21, 1990.

(c) The Record consisted of twelve pages including the docket, exclusive of Petition and Opposition, and that copies of same would be mailed that day.

On December 4, 1990 Gullickson mailed the 12 pages of documents, excluding any documents of distribution of either the Petition or the Opposition (SCR 4). His letter stated the Solicitor General represents the FDIC before the Supreme Court, not necessarily the case. See 12 USC 1141 (b)(4)(10)(F) and 12 USC 1819(b)(2), and 28 USC 518(a)

When Petitioner requested the documents in the record associated with the distribution in writing, Gullickson called on December 14, 1990 to state no such documents existed, that SCR 4 was merely a record entry.

A review of Supreme Court Bulletin indicates that Petitions in which the

Solicitor General is a party are routinely denied in less than 30 days after having been docketed, indicating that denial is routine where the Solicitor General waives its right to respond.

### III ARGUMENT

#### A SUMMARY OF ARGUMENT

1. The court violated its own rules in prematurely distributing the Petition.

2. Said premature distribution was not harmless error but prejudicial to petitioner. It gave the Court the impression that (a) the government was the only respondent and (b) the Government thought the Petition so frivolous as to not warrant an Opposition and (c) from the quick turnaround of receipt of the Petition and issuance of the waiver, about 1 day, the Petition nor Appendix did not even warrant reading.

3. As a result Petitioner was denied a meaningful time frame to issue a Reply

Brief to Opposition by respondents FIBO and FIBC.

4. As a result of the improper service of the waiver, and language of the waiver, said waiver led Petitioner to believe FDIC would file an Opposition, particularly since the Appellate Court's failure to address the dismissal of pendant and ancillary claim against FDIC with prejudice, was a major part of this Petition.

5. As a result of this violation of Supreme Court rules, Petitioner is entitled to vacation of Order denying Petition for Writ of Certiorari, and a reasonable time to prepare, file, and serve a Reply Brief.

6. This motion should be granted in this form as opposed to a petition for rehearing because it is unjust to require Petitioner to pay another \$200.00 to correct a Court and Solicitor General

error.

7. This motion must be granted in lieu of a petition for rehearing because it is unjust to impose the five vote standard for the granting or denial of a Petition for Rehearing when, but for clerical error, Petitioner would have had time to file a reply and/or Supplemental Brief prior to the normal course of decision process by this Court. That is, had not the clerical error been made, Petitioner's documents would have been reviewed on the four vote standard. (petitioner understands this motion is subject to the five vote standard, but this motion only deals with the procedural issue of error.)

8. This Motion must be granted because the issues to be raised in reply or supplemental brief go to the merits of the underlying case, and are needed to point out glaring errors of fact and law



propounded by Respondents FIBO and FIBC.

### DETAILED ARGUMENT

#### 1. Analysis of Facts and Proceedings.

The Solicitor General has repeatedly been referred to as the 10th member of this Court. His office and staff ought to know the procedural requirements for certificates of service required by Rule 29. The Solicitor's deliberate refusal to properly certify service of its Waiver (SCR 3) to parties other than Petitioner was a deliberate effort to confuse the record and/or court that the only respondent was the FDIC, and that therefore the Petition was ripe for distribution upon receipt of the waiver. The fact the Waiver was hand carried is additional evidence that the Solicitor probably verbally assured the Court that petition was ripe for distribution when the Waiver was delivered.

The vague language of the Waiver led

Petitioner to think an Opposition was still coming from FDIC. Failure to copy the FIBO/FIBC counsel seems to have led FIBC/FIBO that FDIC would be submitting an Opposition Brief as well since they served both FDIC and the Solicitor (SCR 5).

Solicitor General and Supreme Court have developed a method whereby a petition can be denied without the need to read same. The Solicitor receives the petition and if it immediately issues a waiver, indicates the U.S. has no interest in the Supreme Court granting certiorari. The Supreme Court then routinely denies the Petition without review.

Alternately, the staff of the circuit justice assigned or "cert pool" might read the Petition and recommend disposition to other staffs, but this does not explain the lack of any entries in the docket other than the briefs stated by clerk on November 30, 1990.

Assuming the November 30, 1990 statement was true, no waiver was filed prior to Petitioner's inquiry on November 30, 1990 and no distribution ever took place, the denial being accomplished by the clerk without submission to the court.

Under this scenario, once the process was questioned, the Solicitor had to file an original waiver between November 30 and December 3, 1990 without service since FIBO obviously had not received same, and the Court could have stamped copies of the various documents after the fact. (Petitioner finds it hard to believe the Supreme Court of the United States is not sufficiently advanced to use an electric date/time stamp to reduce backdating of documents. (To make a copy to one party a copy without sending the original is an old ploy

Said failure of a docket to exist explains Ms Teckeleley's failure to properly

answer when the case was distributed or when the Opposition brief was received (alternately it explains why she mistated the dates to petitioner, that is she realized the court errored in prematurely distributing the petition.

That the case may never have been distributed at all is evidenced by Gullickson's failure to mail the documents on December 3, 1990. He may have had to obtain a signed copy of the waiver from the Solicitor General (the Court may have had an unsigned copy after Petitioner's wife called November 30, 1990), had to develop a docket, and had to come up with the twelve pages he said comprised the record, yet manufacture a docket with distribution documents which did not exist. In short, the docket bears no resemblance to the U.S. District Court docket, or any California court docket.

As certificates of service (according

to Gullickson) are not required to be served on other parties, it is impossible to determine who received what. Saul could avoid Rule 11 sanction for his false statements in the Opposition brief merely by not submitting a signed original. (It is impossible to figure how an original could have been sent by the printer in Nebraska to Freidman in Alaska, thence back to Nebraska, thence to the Supreme Court by November 15, 1990 anyway).

Further, since the distribution of the Opposition brief is on the same entry as the distribution of the Petition, in the worst case scenario, it may well be the Opposition Brief was never distributed to the Court until after this inquiry commenced. Further, certificate of service by the printer does not begin to conform to the Rule 29 requirements. It lacks the proper caption, and caption is improper in that it lists FDIC as the only respondent,

a perpetuation of the error. Soliciter General's waiver made case ripe for distribution.

That Justice O'Conner, assigned the 9th Circuit, or her staff reviewed the Petition and made recommendations to the other justices as part of the "cert Pool" (See The Brethren, Woodard and Armstrong, Avon, 1981, N.Y., pages 323,324, it would be important the Petition Respondents did not include FIBC or FIBO since O'Conner was a Director of First National Bank of Arizona from 1971-1974 (U.S. Supreme Court Bulletin, page 15), a First Interstate Bancorp (then Western Bancorporation) subsidiary, Southern Arizona Bank and Trust Co. merged with said bank on May 14, 1975. Moody's Bank & Finance Manual, 1990 ed. page 1606. This implies O'Conner was once and may still be a stockholder of First Interstate Bank Corporation or a subsidiary. To avoid the appearance of

impropriety, it would be important that the decision to deny the Petition take place prior to circulation of the Opposition brief, to give the appearance the Petition was unworthy on its face, without the need to review the Opposition brief prepared by a company for which a justice or their family may have a financial interest.

In the worst possible scenario, the Petition was not distributed at all, and the Order (unsigned copy sent to Petitioner, SCR 6) was surreptitiously issued by the clerk's staff without authority of the court. With 4500 cases submitted each year this would be easy enough to accomplish.

## 2. The Court Errored in Prematurely Distributing the Petition

Supreme Court Rule 15.5 is clear that distribution does not occur until the filing of a brief in opposition or expiration of the time to file same.



Instead of distributing on November 7, 1990, the Petition should have been first distributed on November 21, 1990. Since neither the Solicitor General nor FDIC entered an appearance for FDIC as required by Rule 9.2. Since FDIC failed to enter a separate notice of appearance indicating it would not be filing a document, Petitioner assumed FDIC would be filing an Opposition brief. Solicitor General's waiver did not indicate the Solicitor General was appearing on behalf of FDIC. Therefore, the Petition should not have been distributed until 30 days after the Petition was received by Solicitor General (about November 5, 1990). Distribution should have taken place December 5, 1990.

3. As a Result of This error  
Petitioner Is Entitled to Vacation of the  
Order and Reasonable Time to File Reply  
and/or Supplemental Brief

As the Court took from November 7, 1990 until November 26, 1990 to decide, it

follows Petitioner should be allowed the same time to file a Reply brief. Assuming Petitioner should have known Solicitor General waived for FDIC, (which is vigorously denied), Petitioner is entitled to 14 days to file a Reply Brief. (This amount is computed by taking the decision time, 19 days and subtracting the time between the date of decision and date of distribution of the Opposition brief, 5 days).

Alternatively, as a result of FDIC failure to comply with Rule 9.2, Solicitor General's failure to comply with Rule 9.2 and 29.3, Petitioner is entitled to 31 days to file a reply brief. (This is calculated by fact the Opposition brief was not due until 30 days after receipt by Solicitor General, or about December 5, 1990. The first day of session after holiday recess is January 6, 1990, thus Petitioner should have had 30 days to

file a Reply brief.

Given this bracketing of time, it seems reasonable that the 25 days for Petition for Rehearing would be a reasonable standard and Petitioner hereby seeks 25 days to submit said brief.

4. This Motion Must Be Granted As Limitations on Petition for Rehearing Would Be Unfairly and Unjustly Applied

This Motion in lieu of a Petition for Rehearing must be granted. The Petition for Rehearing goes to the merits of the Petition and is severely limited in scope by Rule 44. Petitioner must not be limited in scope other than that of a Reply Brief per Rule 15.6 and 33. Further, Petitioner should not have to bear the penalty of paying another \$200.00 caused by an error by Solicitor General and by the Court Clerk. Further, the purpose of the vacation is to allow the Petitioner to point out misstatements of fact and law in the Opposition brief, which addresses

itself to Rule 15.1 rather than Rule 44.

Most importantly, the five votes required to grant rehearing then grant certiorari is an unfair burden on Petitioner since the reasons for reconsideration are the court and Solicitor's procedural errors, not the intervening circumstances or substantial grounds not previously presented of Rule 44.

5. The Reply Brief Will Go to the Merits of the Petition for Writ of Certiorari

FIBO and FIBC elected to argue the merits of the factual case in lieu of the many questions of law presented for review by Petitioner. Petitioner stressed reasons of national importance for the review, and took as true the doctrine that this Court does not review factual considerations. However, FIBO/FIBC continued to falsify the facts and misinterpret the law just as it did before the District and Appellate

Courts. (It is for this reason Petitioner is so concerned that this Court received a signed copy of the opposition

a. Misstatements of Fact by FIBO/FIBC

FIBO included six affidavits of Bank officials, one affidavit of Petitioner and the Affidavit of Charles Homan in its Appendix to Opposition brief. It led the Court to believe this was the extent of evidentiary material on file in the case, which is totally false. Other evidentiary material on file in the case include:

1. Verified Complaint, Sept. 1984 with Exhibits. CR 1. Appendix to motion ("AM") 1.

2. Verified Proposed amended complaint, October 11, 1985, CR 10, Appendix 3 hereto.

3. Affidavit of Michael E. Plunkett, Sept 10, 1984, CR 4. Appendix to Petition ("Ap") page 102

4. Affidavit of Michael E. Plunkett,

October 11, 1985, CR 12, AP page 90

5. Affidavit of Michael E. Plunkett,  
October 15, 1985, Cr 14, "AP" page 89

6. Affidavit of Michael E. Plunkett,  
CR 38, Jan. 27, 1987 , AP page 83.

b. Misstatements of Fact in Opposition  
(pages numbered refer to FIBO/FIBC  
opposition brief.)

Page 3. The Second Deed of Trust  
note, Opposition Appendix J-7,8 is not "a  
different standardized form" but is a note  
extension, or Modification of Deed and  
Trust Note to the second Deed of Trust of  
February 11, 1982. The is a different  
standardized form, the Deed of Trust Note  
form is the same form as the 1981 form, as  
far (as can be remembered since FDIC  
refuses to produce said document).

Page 3. FIBO states petitioner  
alleged FIBO "sometimes made loans, to  
special borrowers, below the published  
prime rate." This is absolutely false.  
Petitioner stated in the verified

complaint that FIBO made over 2500 below prime rate loans(Verified Complaint, CR 1, AM 1, page 8 ).

Page - 4. Contrary to FIBO statement, Wilcox Development Co. v. First Interstate Bank of Oregon 815 F.2d 522 (9th Cir.1987)reinstated RICO claims, 815 F2d at 532 and remanded said claims for refiling as a class action. 815 F.2d at 524.

Page 4-5. Contrary to FIBO's "undisputed" evidence at bottom of page 3, it is disputed whether First Interstate Bank of Oregon participated in the loans with Petitioner. Homan Affidavit FIBO Appendix J-3 para 7, states FIBO was participating in loans with ABC at that time but Homan could not remember whether the loans in question were said participatory loans. Plunkett Affidavit, FIBO Appendix I-2 April 25, 1988 states petitioner's understanding was the FIBO



was participating with Alaska Bank of Commerce. (The words "correspond" and "participate" were used interchangeably by petitioner at the time, not knowing the difference. Affidavit of Bock, Appendix K-3, pointed out the difference, but admitted below prime rates were charged to corresponding banks, a further admission the prime rate was falsely defined by FIBA on the face of the notes.

Contrary to FIBO statement (5) on page 5, the evidence was highly disputed on the issue of whether FIBO knew Alaska Bank of Commerce was pegging its prime rate to FIBO prime rate and whether FIBO knew the prime rate was defined on the face of the note as the rate charged FIBO's most credit worthy borrowers. Homan affidavit, FIBO Appendix J-3, clearly stated the purpose of the pegging was for participation between FIBO and FIBA. Petitioner argued and Wilcox, 815 F.2d at

527 & N.4 proves meetings were held between the participating banks to discuss interest rates. FIBO had to have the Deed of Trust Notes with the prime interest rates misdefined on any loan in which FIBO participated. David Belles, Appendix G-2 claims he did not authorize FIBA to peg the prime rate to FIBO and states he had no knowledge it was being done. He obviously did not read the Deed of Trust Notes received by FIBO in the participation loans.

As to FIBO's point (6) on page 5, FIBO admittedly concealed the fact it was discounting loans below its advertised prime rate. Wilcox is inconsistent with the opinion in Michaels Building Co. v. Ameritrust Co., 849 F.2d 674, 676 (6th Cir. 1988) which cited Living Webster Encyclopedia of the English Language (1971), and American Heritage Dictionary of the English Language (1981) definitions

of "prime rate" as "minimum" and "lowest" rates of interest. Michaels was a prime rate case where some defendants defined prime rate as the rate charged the most credit worthy borrowers and held Antitrust, RICO, and pendant claims should not be dismissed.

Page 5. FIBO claims the only evidence provided was as listed thereafter. This is false. See list above of verified complaints and affidavits as well as facts included in Wilcox, 815 F.2d 522-527. Again it is disputed that FIBO participated, and is disputed that FIBO personnel knew, or should have know, on the participation loans, that FIBA had pegged the prime rate to FIBO and misdefined said rate. Further, FIBA staff learned that a class action suit had been filed on this matter. Homan Affidavit, Appendix J-4. They had to have learned from FIBO yet neither FIBO or FIBA did

anything to rectify the misdefined prime rate.

It is Petitioner's principal contention that FIBO had to have known FIBA was defining the prime rate as the rate charged the most credit worthy borrowers and had to know this was fraud or at least innocent misrepresentation. Once it learned of this FIBO did nothing to correct the matter. FIBO continues to contend that because Petitioner's loans were not participation loans, FIBO is not culpable. This is false. Petitioners were the victim of a scheme to defraud borrowers, resulting from the participation agreement between banks.

Page 6. The corresponding bank arrangement between FIBO and FIBA was not initially disclosed, FIBO trying to make it look like no relationship at all existed between the two banks, when in fact participation was occurring, calling

into question the veracity of FIBO affidavits, which petitioner moved to strike CR 98 which was denied CR 106. FIBO never did admit to the participation loans (FIBO appendices, F,G,H,K,L,M).

FIBO claims the franchise agreement came after the loans. The first loan was still outstanding when FIBC became franchisor of FIBA. FIBA paid a fee to FIBC and FIBA had to follow certain operational standards made by FIBC such as logos etc. ABC, later FIBA obtained a windfall as a result of FIBO's overstated prime rate, and /or as a result of FIBA's misrepresentation of the definition of the prime rate. Proceeds from that windfall went to FIBC in the form of franchise fees. FIBC therefore profited from the misrepresentation.

Page 6-7. It was brought out at the appellate level that an employment condition for McWhorter was to go to work

for another FIBC affiliate, which he did, FIBA. Appendix M-11.

There are many more facts than the few outlined by Opposition, but Appellate Court chose to ignore all of them, focusing only on the items presented for review by Opposition and the facts FIBO chose to present. FIBO App. A.

c. Misstatements in FIBO Statement of Proceedings

Page 7. Petitioner filed pro se, but complaint was prepared by attorney George Weiss, Appendix 1 hereto.

Page 8. Opposition infers District Court gave Petitioner an opportunity to provide additional facts to support a theory of suppression of competition or sinister domination. This is false. No such additional opportunity was granted Plaintiff after Order of Summary Judgment was issued. Despite the fact Petitioner had supplied the Court with Homan Affidavit (FIBO App. J) which proved FIBO

was participating with FIBO on loans which FIBA had misrepresented the prime rate definition, the District Court audaciously concluded "FIBO and Interstate of Alaska had no relationship whatsoever at the time the subject loans were made." Appendix B-4. This statement was made even after FIBO admitted FIBA was a corresponding bank. This mistatement of fact by District Court was reversible error in itself, and was parroted from FIBO's Memorandum in Support of Defendants' Motion for Summary Judgment etc. page 3. CR 85, " At the time the loans were made, the Alaska Bank of Commerce had no connection whatsoever with either First Interstate Bancorp or First Interstate Bank of Oregon." (Grounds for Rule 11 Sanctions)

Page 8. FIBO falsely states District Court relied on Anderson, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 91 L.Ed 2d 265 (1986) ("Celotex") and



Matsushita Elec. Indus. Co. v. Zenith  
Radio Corp. 415 U.S. 574, 106 S.Ct 1348,  
89 L.Ed2d 538 (1986) ("Matsushita") when in  
fact the Court relied on California  
Architectural Building Products Inc. v.  
Franciscan Ceramics Inc. 818 F.2d 1466, 1468  
(9th Cir. 1987) ("California"). A case  
which stated " No longer can it be argued  
that any disagreement about a material  
issue of fact precludes summary judgment"

Page 8-9. "The Court held that  
petitioners' remaining claims all hinged  
on the allegation of conspiracy, and that  
petitioner had failed to make any showing  
whatever that a FIBC or FIBO conspired with  
any other person or entity in a way  
relating to plaintiff's loans."

This statement, although an accurate  
reflection of the District Court order, is  
absolutely false. It however is the crutch  
used by the District and Appellate Courts  
to grant summary judgment on all other  
claims for relief against FDIC, FIBO and  
FIBC including RICO, Alaska Consumer  
Protection Statute violations A.S.

45.50.471 et seq., misrepresentation claims, etc. As a result both the original complaint and Revised Second Amended Complaint are included for Court Review. Appendices 1 and 2 hereto. even if the allegations were all based on the existence of a conspiracy, which is denied, a pro se litigant must be given an opportunity to cure said defects. Noll v. Carlson, 809 F2d 1446-49 (9th Cir 1987), Pleadings of pro se litigants are to be held to a less stringent standard. Haines v. Kerner, 404 US 519, 520-521, 30 L.Ed2d 652, 92 S.Ct 594 (1972).

That Petitioner failed to make "any showing whatever" that FIBC or FIBO conspired with any other person or entity is also false, Petitioner having offered proof of an inference of conspiracy regarding the loan participation program between the banks (ABC and FIBO), and the prime rate pegging used on not just the

loan documents for the participatory loans, but all loans during the participation period, including loans to Petitioner. All such recipients of loans, whether participated in or not were therefore overcharged interest as a result of the misrepresentation and participation agreement.

Page 9. The description by FIBO of the Appellate Court action is also inaccurate. First, Petitioner agrees that mere pegging of the interest rate to interest rate of other banks does not necessarily violate the Sherman Act, or RICO, or comprise a tort or breach of contract. However, Petitioner's claims and evidence proved far more, (1) that a participation program existed between the FIBA and FIBO during the term of the loans, 1981-1984, (2) that pegging was not an independent action as stated by FIBO but a part of the participation program.

FIBA not only pegged the interest rate to that of FIBO but misdefined FIBO's prime rate as the prime rate charged FIBO's most credit worthy borrowers.(3) FIBO had to meet with FIBA on participation loans, Wilcox 815 F.2d at 527, N4 to discuss "interest rates".(4) Therefore FIBO had to have deed of trust notes with the misdefinition on the face for those notes in which FIBO participated. (6) When it had such documents, FIBO concealed the misdefinition, and/or FIBA failed to remedy the defects with Petitioner or any of the class of borrowers so affected, acts in furtherance of the meeting of the minds to defraud Petitioners and to fix interest rates at the falsely defined prime rate.

Thus the court erred in concluding the pegging of the rate was "anything but a legitimate business practice".

Next, FIBO erroneously cites

Appellate Court as stating Petitioner had failed to supply evidence from which a trier of fact might reasonably conclude that FIBO or FIBC was liable for misrepresentation. What the Court said was, "assuming arguendo, that FIBO and FIBC are liable for misrepresentation to Oregon borrowers, there is nothing in the record from which a trier of fact might reasonably conclude that Plunkett has a cause of action against FIBO, FIBA, and FIBC." Thus, for fourth consecutive time, FIBO counsel have rewritten the facts and opinions to suit the nefarious actions of their clients. It also points to the further Appellate error, when it stated Plunkett had no cause of action against any defendant. If nothing else Petitioner has a claim for innocent misrepresentation for mistating the definition of the prime rate on the face of the note against FIBA.

Petitioner also has a claim for

violation of Alaska Consumer Protection statute, A.S. 45.50.471 et seq. against FIBA and FIBO jointly and severally.

The appellate court further erred in holding "petitioner had supplied no evidence from which a trier of fact might reasonably conclude that FIBO or FIBC was liable for misrepresentation to petitioner, with whom these banks had no business relationship whatever." Opp. Brief, page 9. The Appellate Court erred in its presumption there must be a business relationship, i.e. contract for a tort, misrepresentation, to occur (this is akin to a theory that the bicyclist must have a contract with the auto driver who runs over her to recover). Further, Petitioner relied on Restatement, (Second) Torts, Sections 531-533 wherein misrepresentation can be indirect. Petition at 46. Petitioner provided evidence, Appendix I-6,7, of telephone

communication with FIBO in which FIBO misrepresented its prime rate for each month requested, since "prime rate" is a term of art meaning "lowest" and "minimum" rate, Michaels Building Co. v. Ameritrust Co., 848 F.2d 674, 676,n. 2 (6th Cir. 1988), which the rates given over the telephone by FIBO clearly were not, Appendix I-7, evidence of a "business relationship between Petitioner and FIBO" and/or misrepresentation by FIBO

Contrary to last sentence in Op. Brief page 9, Appellate Court did not state the District Court had "weighed both state and federal claims" but stated "since all of his claims, both state and federal, were based on an allegation of conspiracy". So again, FIBO miscites the Court in an attempt to cover\_ for Appellate Court's shortcomings including improperly affirming the district court's weighing the credibility of the evidence



FIBO App A-3. If nothing else the Appellate Court misapplied the abuse of discretion standard in its review of the District Court's granting of summary judgment, when it should have reviewed the pendant and ancillary claims summary judgment de novo. FIBO App. A-5

Finally, FIBO fails to mention the Petitioner denied Petition for Rehearing by majority rather than unanimous vote (as presumably the Memorandum was).

d. Misstatements in FIBO Summary of Argument

FIBO argument is a falaciously circular one with the smallest possible radius!

(1) A pro se litigant is not entitled to notice of the change in evidentiary standards necessary to resist a defendants motion for summary judgment (which occurred after the action was filed) and therefore,

(2) because pro se litigant failed to meet the ne unknown evidentiary burden (not stated in the Federal Rules of Civil Procedure, but in Court cases occurring after the complaint was filed and not even appearing in the treatises until after the Motion for summary judgment was briefed), defendants are entitled to summary judgment,

In short, FIBO argues a pro se litigant must practice law, just like an attorney, by keeping apprised of the latest Supreme and Appellate Court Opinions each week, or face disposition on technical grounds.

Page 10. FIBO errors in its presumption FIBC/FIBO had to have knowledge of each loan to be liable for the interest overcharge. FIBO misconstrues the duty imposed by the 10th Circuit in Jaxon v. Circle K Corp. 773 F.2d 1138, 1140 (10th Cir. 1985) was "complex

procedural issues" not just need to file affidavits, but also possibility of verifying complaint (which Petitioner did and which FIBO continues to ignore). FIBO misconstrues the germain issue of this case being notice of the change of evidentiary standard as a result of this Court's decisions in Anderson, Celotex and Matsushita. Contrary to FIBO summary, Court's need not explain evidentiary requirements or even changes to those requirements. They merely have to reference treatises, law review articles, or FIBO's cited Federal Rules Decisions article to inform the litigant of the meaning behind the rule. Alternatively, as the Court's are now doing, they can revise FRCP Rule 56 to reflect the changed standard.

e. Misstatements in Argument

I. Misstatements that Pro Se Litigant Is Not Entitled To Prior Advice.

Contrary to FIBO statement, Jacobsen

v. Filler, 790 F.2d 1362 (9th Cir. 1986),  
Brock v. Hendershott 849 F.2d 339,343 (6th  
Cir. 1988) are at variance with Jaxon v.  
Circle K Corp., 773 F.2d 1138,1140 (10th  
Cir. 1985) and impliedly with Lewis v.  
Faulkner, 689 F.2d 100,102 (7th Cir.  
1982) and said variances are presented  
here. Namely, whether notice of procedural  
requirements are owed a pro se litigant.  
With that goes notice of changes to  
procedural requirements. By procedural,  
Circle K and Jacobsen meant notice of  
"complex issues" such as need to file  
affidavits, verified complaints, etc. to  
resist summary judgment. Alternatively, as  
suggested by Jacobsen, a rule change is in  
order rather than special notice to pro se  
litigants. This is what the Court system is  
undertaking. Rule 56 revision has just  
with the last two weeks (according to  
conversation on 12/17/90 Ann Gardiner with  
Administrataor of U.S. Courts, been

approved by the Advisory Committee on the Rules of Federal Civil Procedure) and said Rule change will not change the "standards" (conversation with Paul Carrington, Reporter for Advisory Committee, 12/17/90). Said rule change will be submitted to Standing Committee for eventual submission to the Supreme Court and Congress.

A. Misstatements of Law that Standard for Granting Summary Judgment has not Changed in any Manner which would Affect the Outcome as to Petitioner's Claims

On Page 12 et seq., appears to be FIBO's principal argument: that opposing party must rebut moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. and that said standard was in effect long before this court's holding in Anderson, Celotex and Matsushita. FIBO relies on a 1984 article, Summary Judgment Under the Federal Rules: Defining Genuine Issues of

Material Fact, Schwarzer, 99 FRD 465,467 (1984) to falaciously state Anderson, Celotex and Matsushita did not change any standard. Stempel's A Distorted Mirror, the Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process, 49 Ohio State Law Journal 96,181, 1988 summarizes Anderson as " In essence, the Court amended Rule 56 to replace the words 'genuine dispute of material fact' with words akin to ' facts presented by the nonmovant of sufficient weight to convince the trial judge that he or she would not grant a directed verdict for the movant at trial" and "taken together effected major changes in summary judgment doctrine and practice," id at 99, and "these cases, particularly Liberty Lobby effectively rewrote rule 56 without benefit of the proceedings for amending the Federal Rules required by the Rules Enabling Act of 1934." (28 USC 2072 (1982)

id.

Further FIBO admits Anderson et al resolved confusion to insure uniformity. If the Court's were confused, what of the ignorant pro se litigant not informed of the confusion which was resolved, or even where to read the "confusion resolution".

FIBO next infers First National Bank of Arizona v. Cities Service Co. 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed. 2d 569 (1968) required the same standards established by Anderson et al, which is clearly inconsistent with California Architectural Products Inc. v. Franciscan Ceramics, Inc. 818 F.2d 1466, 1468 (9th Cir 1987) which stated "no longer can it be argued that any disagreement about a material issue of fact precludes summary judgment."

At page 15, FIBO again relies on Schwarzer's position paper, which in 1984 was not the law of the land.



FIBO next makes a false leap to conclude that because several other 9th circuit cases have granted summary judgment to movant for lack of evidence of nonmoving party, Petitioner's claim must necessarily also be dismissed. Said cases would be addressed in reply brief.

FIBO next falaciously claims no probative evidence of antitrust, or other theories was provided. Certainly innocent misrepresentation by FIBA was proved. Certainly AS 45.50.471 claim against FIBO, and/or FIBA was proved. Certainly defamation against FIBA was proved. == Certainly breach of contract against FIBA was proved. Though factual issues are not normally addressed by this Court, FIBO continues to harp that because there are no facts, (a falsehood) to support the various theories against various defendants, there is no right to trial, or granting of certiorari.

National Bank of Arizona, now (First Interstate Bank of Arizona), a FIBC subsidiary, burden has been met. The triable issue is whether a meeting of the minds existed between FIBA and FIBO/FIBC in the course of the participation agreement whereby FIBO and FIBA would - conceal FIBA's misrepresentation of the prime rate on the face of the notes FIBA was using, whether FIBO participated on the loans in question, and regardless if they not participate on the loans in question, whether the advertised prime rate was understood at the time to be the lowest or minimum rate, and whether a price fixing enterprise resulted as a result of the loan participation action between the two banks ( that is, whether the prime rate was maintained at an artificially high level due to belief the prime rate, as defined in the notes and as generally understood by the public was the

lowest rate, when in fact it was an average rate. FIBO's conclusion that Petitioner failed to meet the burden of Cities Service is based on the illogical extension of a false premise, (that no evidence was proffered to support a theory). This analysis is further misplaced in that it presumes a nonmovant must raise a genuine issue as to every essential element of a theory. This is false. Nonmovant must, under revised standards, present facts to sustain burden of proof, but under previous standards needed only to raise a genuine issue as to one essential element of each claim.

Even if, arguendo, Petitioner did not meet the Cities standard, it is because as a pro se litigant, no notice of the subtleties of Federal evidentiary requirements was given, such as a list of articles like Schwarzer, or local rule

requirements like Arizona District Court had as outlined in Jacobsen v. Filler, 790 F2d 1362, 1364-6 (9th cir 1986) (Jacobsen").

B. Misstatements that a Pro Se Litigant is Not entitled to Prior Judicial Explanation of Standards for Granting Summary Judgment

First, FIBO misconstrues Faretta v. California, 422 U.S. 806, 835, n.46, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), which spoke for much special treatment such as appointment of standby counsel, even over prisoner's objections. The key word is "rules" in "relevant rules of procedural and substantive law." Petitioner complied with Rule 56 to the letter. It did not, and without extensive research, could not, have known the substantive evidentiary burden had drastically changed since the case began.

Next, again FIBO tries to ignore the notice requirement in Jaxon v. Circle K Corp. 773 F2d 1138, 1139-40 (10th Cir.

1985) ("Jaxon") as being far more than notice to file affidavits, " Under these circumstances, we conclude that the district court's failure to grant Jaxon additional time to obtain affidavits or to verify his complaint requires reversal of summary judgment against him." . . . "

'District Courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." citing Garaux v. Pulley, 739 F.2d 437,439 (9th cir. 1984), "The district court abused its discretion by failing to give Jaxon a 'meaningful opportunity to remedy the obvious defects in his summary judgment materials'" Citing Barker v. Norman, 651 F.2d 1107,1128-29 (5th Cir. 1981), "pro se prisoner in civil rights case must have notice of the requirements and reasonable opportunity to submit counteraffidavits" citing Lewis v.

Faulkner, 689 F.2d 100 (7th Cir. 1982),  
Roseboro v. Garrison, 528 F.2d 309,310  
(4th Cir. 1975), Hudson v. Hardy, 412 F.2d  
1091,1094-1095, (D.C. Cir. 1968).  
(emphasis supplied). Again, FIBO wants the  
notice requirement to concern only  
Affidavits and ignore the verified  
complaints, hereto, and "complex issues"  
notice of "Jaxon". on file in the case.  
App. 1 to Motion.

FIBO next misconstrues Jacobsen which  
is inapplicable since it was based on  
local Arizona rules which required  
specific factual showing, which Alaska  
Local rules did not. Petition Appendix,  
pages 149-153.

FIBO next overstates Petitioner's  
level of assistance request, and thereby  
attempts to circumvent applicability of  
the conflicts of Jacobsen, Brock v.  
Hendershott 849 F2d 339, 343 (6th Cir  
1988), and Jaxon. Petitioner claims notice

of the Rule change would have been sufficient( using the "duck" analogy , Anderson walked like a rule change). Additional discovery would have been attempted (FIBA through FDIC is the culprit which foiled attempts to obtain the hidden information which would have provided more direct evidence that FIBO had in its possession copies of the loan documents with the misdefinition of the prime rate on them, when they had them, and the period of time they did nothing to correct such obvious misrepresentation). That one loan officer swears(App. G-2) (to avoid prosecution for a felony) he (as opposed to some other officer's knowledge)did not have any knowledge of Petitioner's - loans, or FIBO did not"specifically" (as opposed to "generally") authorize FIBA to peg the prime rate to FIBO's prime rate, is cleverly crafted perjury, highlighting the



depths FIBO will stoop to avoid civil and criminal liability, and the difficulty it has been and would be to obtain materials and facts known only to FIBO (like who holds the loan documents with the misdefinition of the prime rate on them).

For these reasons credibility disputes are particularly inappropriate for summary judgment disposition, especially those involving the affidavit of an interested party concerning facts known only to him. Madison v. Deseret Livestock Co., 574 F.2d 1027,1037 (10th Cir. 1978), Jaxon, 773 F.2d at 1140 n. 2. Court's duty to inform nonmoving party of right to file affidavits is heightened where nonmoving party has superior access to the facts. Johnson v. RAC Corp. 491 F.2d 510,514 (4th Cir. 1974).

FIBO mistakenly analyzes the notice provisions of the cases as a "bare procedural requirement", that is lip

service to protect the courts from miscarriage of justice. What FIBO ignores is every pro se case must be taken on its own. Caruth v. Pinckey, 683 F.2d 1044, 1050 (7th Cir. 1982) cert. den. 459 U.S. 1214 (1983), cited in McGlaughlin, Extension of the Right of Access, 55 Fordham Law review, 1109, 1115. (1987). None of the pro se cases cited involve Antitrust or RICO actions, although their elements can be no more difficult than the poor prisoner having to wrestle with the "invidiously based discriminatory animus" of a 43 U.S.C. 1985 claim. Again it is the essential elements which must be proved on every claim to avoid summary judgment, a drastic change from previous requirements.

Footnote 3, on page 17 requires response. Suddenly, before the Supreme Court of the United States, in a Petition for Writ of Certiorari, Petitioner is somehow obligated to describe for a Court

not concerned with review of the facts at all, what additional facts Petitioner "could now muster" given a reversal. As described at Appellate (the appropriate) level, Petitioner would compel response to discovery from FDIC, attempt to obtain additional information from Charles Homan, depose FIBO and FIBC personnel now that ~~is~~ Petitioner may be able to afford to do so, propound paper discovery on FIBO, FDIC and FIBC, and submit yet another affidavit describing in excessive detail attempts to obtain financing prior to consummation of these loans and after the loan was called in 1983, the conversations with National Bank of Alaska staff etc., the relationship with Anchorage School District and FIBA (as to Certificates of Deposit, etc.) McWhorter and Frank Kauffman's antics, Jerry Kurtz's statement that 15 borrowers approached FIBA regarding interest overcharges on

learning of the FIBO, Wilcox 815 F2d 522 (9th cir 1987), line of cases, etc. In short, Petitioner will provide direct and circumstantial and documentary evidence sufficient to make a prima facie case of every claim for which FIBO, FIBC and FIBA seek summary judgment. Petitioner has contacted expert witness in Wilcox cases and will obtain affidavit regarding interest overcharges by category and amount.

Regarding ample opportunity to obtain discovery, since Petitioner was not advised of the change in rules to resist summary judgment, Petitioner seeking discovery from FIBO and FIBC, who had already demonstrated their willingness to skew the facts beyond belief would be suicidal. The net result would be a Record filed with admissions, interrogatories and responses all denying everything, making an even stronger case, although falsified,

for FIBO and FIBC, without production of any documentary evidence, even on order to compel.

FIBO again mistates the case of Jaxon on page 18, and falsely states Petitioner sought advice on evidentiary requirements. Petitioner, to guarantee due process, was entitled to notice of the de facto rule ~~change~~ change caused by Anderson, Celotex and Matsushita, particularly since the District and Appellate Courts pointed out the defects in petitioner's summary judgments were obvious, "factual paucity" etc. Appendix A-5 (a characterization Petitioner denies). See Jaxon 738 F.2d 1139.

FIBO's arguendum ad horrendum on page 18 may be dismissed as self serving Bar Association Marketing Strategy. No such judicial advocacy, advice, or review is requested or warranted. Mere cross reference, as attachment to local rules

(as State of Alaska Rules used to do, cross referencing treatises etc.) or otherwise is sufficient. Alternatively revision to Rule 56 is warranted and is progressing.

II Misstatements THAT SUMMARY JUDGMENT WAS APPROPRIATE

First, this argument only deals with FIBO and FIBC, not FDIC. Second, FIBO attempts to dampen the merits of any legal appeals by the argument that even if right, Petitioner's claims will still fall for lack of evidence. Again, the lack of evidence is due to lack of notice of evidentiary requirements, and refusal of FDIC to meaningfully respond to Discovery under the guise of caretaker, privacy rights, lack of knowledge (FDIC failed to conduct any investigation whatsoever in preparing answers to interrogatories, and admitted so).

Contrary to FIBO statement, there was

no requirement by any court to distinguish Petitioner's case from Wilcox, and furthermore, said distinction was made by evidence that is undisputed that the prime rate was defined on the face of the notes in which FIBO participated and on Petitioner's notes which was not the case in Wilcox line of cases. Further, in appellant's supplemental brief, Petitioner outlined over 30 cases nationwide dealing with the rate fixing cases, many which defined the prime rate on the note. Again, whether a coconspirator has knowledge of every victim of the conspiracy and/or fraud and/or violation of consumer protection statutes is immaterial.

On page 20, FIBO falsely claims Petitioner failed to produce evidence distinguishing FIBO from the Wilcox cases. The loan participation program with FIBA is the distinguishing element, and the existence of the misrepresented prime rate



definition on the face of the notes in which FIBO participated distinguishes the case from Wilcox. What also distinguishes the case is the evidence taken in the light most favorable to the non moving party stated FIBO discounted over 2500 loans below the advertised prime rate makes the falsified prime rate a price fixing conspiracy. That is, by inflating the prime rate, and discounting below it, FIBO and FIBA were able to overcharge the unknowing on the one hand, while inducing the unknowing competitors to keep their prime rates the same, without discounting, thus FIBO and FIBA were able to attract customers seeking discounted loans from other banks while other banks continued to peg their prime rate to an artificially inflated and fraudulently defined rate.

Contrary to FIBO page 20, the inference of conspiracy is sufficient to raise a genuine issue for trial. The

lockstep arrangement of FIBO discounting 2500 loans while FIBA falsifies the prime rate definition as part of a participation program victimized countless borrowers, whether FIBO participated or not in the specific loans.

FIBO cites Cities on page 21, which states a claimant is not entitled to trial when no probative evidence is submitted. As Petitioner submitted some probative evidence, and as FIBO and FIBC admitted to other (that meetings were necessary and held on participation loans to discuss interest rates, Wilcox, 815 F.2d at 527), and as Petitioner is prepared to obtain and through discovery produce much more evidence, now that it understands the burden now imposed, Cities is inapplicable.

Once again, FIBO lies on page 21 when it claims no evidence was proffered to sustain any state or RICO claims. This is

absolutely false. See Appendix 1 hereto, Affidavits and verified complaint. Again on prime rate definition, FIBO failed to deny or otherwise point out no genuine issue of material fact existed on RICO claims so summary judgment should have been denied on this claim in the first instance. Next, FIBO position is contrary to Michaels Building Co. 848 F.2d 672, at 676 n. 2 where the prime rate is a term of art understood as the lowest or minimum rate. As such, FIBO and FIBC concealed and omitted their different definition, another brand of misrepresentation.

Page 22. Pendant and Ancillary Claim Misstatements. District Court improperly granted summary judgment to FDIC for failure of Petitioner to file a separate Opposition to FDIC Motion despite the memorandum in Opposition on file which described FIBA culpability at length, and despite the existence on file of verified

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complaint, verified amended complaint, affidavits and documentary evidence supporting verified complaint and affidavits. District Court further dismissed with prejudice (apparently) the pendant claims against FDIC even though FDIC did not request summary judgment on said claims, and despite the fact no evidence was submitted by FDIC, Nor did FDIC they point out no genuine issue of material fact existed on any of the claims against FDIC. Therefore it was plain error for the court to grant summary judgment as to FDIC given the record before the District Court. It was further plain error for the Appellate Court to uphold summary judgment on the grounds all claims were based on an allegation of conspiracy, as the District Court also wrongly stated. Appendix 2 hereto. The document speaks for itself. Even if it could be construed, which is denied, all claims were based on

the allegation of conspiracy, pro se Petitioner is entitled to amend to correct the defect.

As to FIBO and FIBC, the court did review affidavits and other elements, however, a prima facie case of RICO, A.S. 45.50.471 et seq, A.S. 45.50.5~~62~~ et seq (State antitrust) claims were also presented. As Alaska has refused to adopt the standard set in Anderson, Moffat v. Brown, 751 P.2d 939,943 & N.5 (Ak. 1988), the genuine issue standard of Alaska should have been used to review the pendant and state claims, since the Federal Courts are obligated to apply Alaska law in deciding state claims. FIBO misapplies United Mineworkers v. Gibbs, 383 U.S. 715,726, 86 S.Ct. 1130, 16 L.Ed 2d 218 (1966) in that said citation holds that pendant claims are to be dismissed for refiling in State Court. Arizona v. Cook Paint & Varnish Co., 541 F.2d 226,227-228,

(9th Cir. 1976) per curium), is inapplicable as pendant claims had been decided by the court at trial (not summary judgment) prior to the Federal Antitrust claim. Id. at 228. "We read Gibbs and Wham-O-Mfg. only to require district courts not to reach out to decide state law questions that need not be decided." Id. District Court or Appellate court did not need to decide State claims. By linking the conspiracy to all claims (wrongly) District Court and Appellate Court fabricated a grounds to "need" to decide state claims. However, it is clear neither court needed to do so. State claims were not based on conspiracy and therefore should have been removed to state court.

#### IV Conclusion

In the interests of justice, this motion to vacate the Order denying the Petition for Writ of Certiorari must be

granted. Petitioner must be given at least 14 days and no more than 30 days to serve and file a reply Brief. Said brief will state the essential elements of each claim against each respondent and outline the admissable evidence on file in the case with citations to the record to demonstrate Petitioner met his burden under the pre Anderson standards and Alaska state standards for pendant and ancillary claims. It will further demonstrate that the Anderson standards have also been met, or if this Court finds said standards have not been met, it must find said failure to meet these standards is due to FDIC failure to meaningfully respond to discovery requests and/or a result of Petitioners lack of notice of the de facto rule change effectuated by Anderson, Celotex and Matsushita. Reply brief will also address the legal issues raised by FIBO including cases in other



circuits at variance with Wilcox line of cases and cases holding Appellate Court erred in applying Wilcox to the instant case when it should have applied more applicable cases from other circuits.

This Motion should not be converted to a Petition for Rehearing because it is based on procedural error by the court and Petitioner should not be subjected to the \$200.00 fine for filing a petition for rehearing, nor should petitioner be subjected to the more stringent requirements of a petition for rehearing, as well as the five vote standard needed to obtain granting of writ of certiorari upon petition for rehearing.

In anticipation of FIBO/FIBC and probably FDIC's Opposition to this Motion on numerous grounds, it had been necessary to in detail, point out to this court the falsifications of fact and law rampant throughout the opposition Brief and the

Record in this case. counsel for FIBC/FIBO have taken liberty not to sign the original of the Opposition, in hopes Rule 11 sanctions can be evaded.

Opposition Brief failed to address numerous issues presented for review, and in fact elected to rewrite the issues for itself. This is the same procedure used at the Appelalte level to discourage the Court of Appeals from addressing these issues. As a result, it is necessary to file yet another separate Motion to submit the entire record to this Court so that it may evaluate for itself whether supervision over the 9th circuit is in order in this case. By so inspecting the record, it will recognize the blatant disregard for facts of record, verified complaint, and affidavits ignored in reaching its distorted decision

If a non prisoner pro se litigant is entitled in one part of the United States

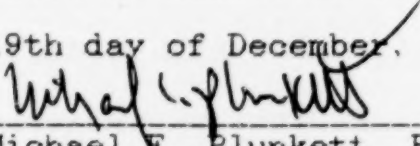
to notice of even the barest procedural requirements for submitting affidavits, certainly a non prisoner pro se litigant<sup>==</sup> is entitled to de facto notice of changes in the rules of civil procedure, which everyone but respondents FIBO/FIBC agree is the essence of Anderson. Advice has never been the issue, only notice, in the form of local rules as Arizona has, in the form of Rule 56 changes as are being right now promulgated, or in cross reference to case law, treatises relating to changes in the law, law review articles, etc. The judge does not have to evaluate anything.

It has been necessary to point out the errors in FIBO argument and presentation to avoid the obvious opposition: that it is silly to vacate the Denial of Petition because the Petitioner cannot possibly meet his burden, even if given opportunity for reply brief, and therefore it is not judicially economical

to vacate a decision on procedural grounds only to deny the Petition again. Unlike practicing attorneys versed in the law, a pro se litigant, to avoid manifest injustice, to focus on the issues raised by opposition, or alternatively to point out the issues ignored by the opposition of the law is so vast a pro se litigant, without benefit of education in legal theory is at a loss to evaluate the merits of one issue over another and therefore must present all, saving the loans and emphasis for the reply brief.

I certify this motion is not for the purpose of delay is presented in good faith to remedy a procedural error caused by no fault of petitioner and is filed pursuant to Rule 21.2(b).

Dated at Manhattan Beach California,  
this 19th day of December, 1990.

  
Michael E. Plunkett, Pro se

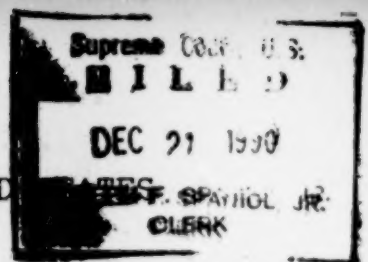
on his own behalf and on behalf of his

partnership interests in Lane + Knorr +  
Plunkett, Architects and Planners and Lane  
+ Knorr + Plunkett Investment Company

5  
NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990



MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND  
PLANNERS; LANE + KNORR + PLUNKETT,  
INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT  
COMPANY,  
PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
RECEIVER OF FIRST INTERSTATE BANK OF  
ALASKA; FIRST INTERSTATE BANCORPORATION;  
FIRST INTERSTATE BANK OF OREGON,  
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

APPENDIX TO MOTION TO VACATE ORDER DENYING  
PETITION FOR WRIT OF CERTIORARI

Michael E. Plunkett, Pro Se  
331 8th St  
Manhattan Beach, Cal. 90266  
(213) 379-9848

DECEMBER 19, 1990.

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NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND

PLANNERS; LANE + KNORR + PLUNKETT,

INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT

COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

RECEIVER OF FIRST INTERSTATE BANK OF

ALASKA; FIRST INTERSTATE BANCORPORATION;

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DECEMBER 19, 1990.

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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett; Lane+Knorr+)  
Plunkett, Architects and Planners)  
Lane+Knorr+Plunkett Investment )  
Company, also known as LKP )  
Investment Company; Michael )  
Plunkett, Inc.; and all others - )  
similary situated, )

Plaintiffs. ) Complaint

v. )

First Interstate Bank of Alaska, )  
formerly, Alaska Bank of )  
Commerce, First Interstate )  
Bancorporation; First Interstate) No. A84-387  
Bank of Oregon, formerly First ) Civil  
National Bank of Oregon; Alaska )  
Title Guaranty Agency, Inc.; and ) 3 exhibits  
unknown Defendants, Does 1 )  
Through 35, ) Jury Trial  
Defendants. ) demanded

Come now Plaintiffs, Michael E.

Plunkett, pro se, and Lane + Knorr Plunkett, Architects and Planners, Lane + Knorr + Plunkett Investment Company, also known as LKP Investment Company; and Michael Plunkett, Inc.; by and through counsel, George E. Weiss, and complain of Defendants alleging as follows:

### GENERAL ALLEGATIONS

1. JURISDICTIONAL STATEMENT. That jurisdiction is conferred herein by virtue of the following provisions of law: 15 U.S.C 1 et seq., especially, without limitation, 15 U.S.C. 1, 2, 13, 15, and 18; federal and state laws regulating the practice of banking institutions; 28 U.S.C 1331; 28 U.S.C. 2201-2202 Federal Civil Rule 65; Federal Civil Rule 23 (if invoked); A.S. 11.76.110; A.S.45.45.010 et seq.; A.S.45.50.471 et seq.; A.S. 45.50.562 et seq., Chapters 1, 5 and 10 of Title 6 of Alaska Statutes; A.S. 09.60.010 and Alaska Civil Rule 82 and by Plunkett v. 1st Interstate Bank-Complaint

virtue of the doctrines of pendant and ancillary jurisdiction - see e.g. **United Mine Workers v. Gibbs** (1966) 383 U.S. 715, 725, 16 L.Ed.2d 218, 228, 86 S.Ct 1130, 1138; and that jurisdiction exists under other provisions of federal and state law.

2. That if it is determined in the course of discovery that Plaintiffs have a claim for relief for which jurisdiction is provided under 18 U.S.C. 1961-1968, Plaintiffs pray leave to amend their complaint to add such a claim.

3. That justice requires federal Court recognition of the pendant and ancillary claims under state law to the extent that such claims might be compulsory claims which could be precluded by the doctrines of merger and bar, res judicata or collateral estoppel upon any judgment which is entered in this action.

4. (a) That Plaintiff, Michael

Plunkett, is an Alaskan resident, and is an individual who has suffered direct and indirect harm as a result of the Defendants' conduct described herein; (b) that Plaintiff, Lane+Knorr+Plunkett, Architects and Planners is a partnership comprised of Michael E. Plunkett and Donald R. Knorr; (c) that Plaintiff, Lane+Knorr+Plunkett Investment, is a partnership comprised of Michael E. Plunkett and Donald R. Knorr; (d) that Plaintiff, LKP Investment Co. is a dba under which Plaintiff, Lane+Knorr+Plunkett Investment Company is and has been operating; (e) that Plaintiff, Michael Plunkett, Inc., is an Alaskan corporation and a separate and distinct entity; (g) that to the extent that there are any conditions precedent to the filing of this suit, such as compliance (if required) with A.S. 10.05.720, or any other lawful requirement which may be necessary (if

Plunkett v. 1st Interstate Bank-Complaint

any) for the bringing of this lawsuit, said conditions precedent have been met and (h) that Plaintiffs are fully competent to bring this action in any case.

5. That Defendants, First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce; First Interstate Bank Corporation; First Interstate Bank of Oregon, formerly, First National Bank of Oregon; all said banks or banking corporations are hereinafter referred to as Defendants, "banks" or "the banks." The banks are domestic and foreign bank corporations which engage in interstate commerce, and which are doing business in Alaska and/or doing business outside Alaska which is affecting business which had occurred, and is occurring, in Alaska.

6. That Defendant, Alaska Title Guaranty Agency, Inc., is an Alaskan



corporation which has placed the below-described real property on the market for a trustee's sale under a deed of trust foreclosure on behalf of the beneficiary, Defendant, First Interstate Bank of Alaska.

7. That the persons, Donald Knorr, Anne Knorr, and Carmin Plunkett, may claim to have have interests or claims separate than that which are presently represented and asserted by the present Plaintiffs. If said Donald Knorr, Anne Knorr, and Carmin Plunkett are determined to be necessary and indispensable parties to this action, Plaintiffs pray leave to add such parties and/or any other parties determined necessary or desirable for a fair and just resolution of the dispute.

8. That Defendants, Does 1 through 35, are presently unknown and their relationship to the present action is unknown, although it is believed that the

Plunkett v. 1st Interstate Bank-Complaint

Defendants, Does, are persons and entities responsible and liable to Plaintiffs upon the claims for relief or related claims as against the named Defendants. Plaintiffs pray leave to amend to add said Defendants, Does, when their identity becomes known, and if it becomes desireable or necessary to add such parties.

9. That during the years 1980 and 1981, the named Plaintiffs entered into an agreement with Defendant, First Interstate Bank of Alaska, then known as Alaska Bank of Commerce, for purposes of obtaining financing of the construction of the building now located at 600 Barrow Street in Anchorage, Alaska. The loan in principal amount of \$1,667,000.00 had an interest rate determined at three and one half percent above the prime rate, which had been defined as the prime rate charged

by the First National Bank of Oregon, Portland, Oregon, to its most credit worthy borrowers.

10. That in May of 1984, the United States District Court For the District of Oregon, in three companion cases, Wilcox Development Co. et al v. First Interstate Bank of Oregon et al, Civil Case No. 81-1127-RE; A. C. Distribution Co., Inc. et al v. Pacific Western Bank et al, Civil Case No. 81-1128 RE; and Kunkle v. First Interstate Bank of Oregon et al, Civil Case No. 82-754 RE, found that Defendants, First Interstate Bank Corporation and First Interstate Bank of Oregon, formerly First National Bank of Oregon had been guilty of violating the federal antitrust and trade practices statutes as herein alleged as against Defendants, banks, in the anti-competitive and unlawful discounting (below the published "prime" rate) on over 2500 loans.

11. That Defendants, banks, are estopped and barred from asserting the legality of their practices as alleged in the present case (a) by virtue of collateral estoppel upon the judgments in the cited Oregon cases; (b) because of the tying relationships between the Alaska banks and the First Interstate Bank Corporation, and First Interstate Bank of Oregon, formerly, First National Bank of Oregon; (c) because of the contractual and other relationships as existed between the Alaska and the out of state banks; (d) to the extent it is determined that the Alaska and the out of state banks acted as agents and representative for one another; (e) that to the extent it is determined that the Oregon or other foreign banks acted as the 'alter ego' for the Alaska banks; (f) that to the extent that it is determined that a conspiracy to set

interest rates in violation of federal and state antitrust and trade practices laws (and in violation of Plaintiffs rights as otherwise complained of herein) existed among the Defendants, banks, and among Defendants, banks, and others; and (g) and because it would violate fundamental concepts of fairness and justice to permit the Alaska banks to profit from illegal activity on the part of others with whom the Alaska banks had acted in concert as herein alleged.

12. That Plaintiffs suffered direct damages as a result of the interest overcharges, usury (if applicable) and other unlawful activity of the Defendants in a sum in excess of FIFTY THOUSAND DOLLARS (\$50,000.00), the exact amount of which is to be determined at trial; and that Plaintiffs suffered consequential damages as elsewhere alleged and in particular in the form of impaired cash

flow resulting in Plaintiffs' inability to meet their ongoing obligations.

13. That the aforesaid loan agreement between Plaintiff's, Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners; Lane + Knorr + Plunkett Investment Company, also known as LKP Investment Company and Defendants, First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, had been, and is secured (inter alia) by a deed or deeds of trust on the real property located in Anchorage, Alaska, in the Anchorage Recording District, Third Judicial District, State of Alaska and Better described as:

**PARCEL No. 1:**

**RESIDENTIAL UNIT E, 600 Barrow Street, a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on 10 February 1982 as Plat No. 82-20, as identified in the Declaration recorded**

10 February 1982, in book 697 at Page 942, in the Anchorage Recording District, Third Judicial District, State of Alaska.

**TOGETHER WITH** and undivided 8.574 % interest in the common areas being Lot 1, Block 110, Original Townsite of Anchorage, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

**PARCEL No. 2**

**UNIT No. A-5, SEACLIFF TERRACE CONDOMINIUM**, as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on 22 June 1977 under File No. 77-107, and identified in Declaration Submitting Real Property to the Horizontal Property Regimes Act for the State of Alaska, recorded 22 June 1977, in Book 203 at Page 754, **TOGETHER WITH** the right to the exclusive use of Deck Space designated as AD-5; the Parking Space designated as AP-5; and the Storage Space designated as AS-5.

**TOGETHER WITH** an undivided 2.98% interest in the common areas and facilities appurtenant to Unit A-5, as set forth in said Declaration.

14. That Defendant, First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, by and through the trustee, Alaska Title Guaranty Agency, Inc., has  
Plunkett v. 1st Interstate Bank-Complaint



declared and published its intention to foreclose and sell the above-described real property on 12 September 1984 at a foreclosure sale in Anchorage, Alaska; and that Plaintiffs stand to suffer irreparable harm and loss unique and valuable interests in the real property unless the Court intervenes to provide relief, there being no adequate or complete remedy available at law. At the time of the notice of default under the notes and deeds of trust, Plaintiffs had allegedly been in arrears to the Defendant, First Interstate Bank of Alaska for a sum of about \$10,000.00, far less than the unlawful overcharges assessed by Defendants as aforesaid.

15. That as a result of the illegal conduct on the part of the Defendants, Plaintiffs, Michael E. Plunketts and Lane + Knorr + Plunkett, Investment Co. and

Architects and Planners, had been forced to incur additional indebtednesses, at least one of which again had been pegged to the illegal and fraudulent prime rate; and that additional direct and consequential damages had been incurred thereby.

16. That the illegal published "prime" rate which the Defendants, banks, based rates which had been charged to the Plaintiffs, had been, and is discriminatory and anti-competitive.

17. That upon information and belief, all or some of the Defendants, banks, had unlawfully colluded and conspired at various times to deprive Plaintiffs of additional loans, which would have relieved the distress in which Defendants had placed Plaintiffs.

18. That Plaintiffs had not been aware, and could not reasonably have become aware, of the unlawful activities of the Defendants until the decision of the Plunkett v. 1st Interstate Bank-Complaint

Oregon Court had been reported in the newspaper in May or June of 1984.

19. That in or about February of 1983, Frank Kauffman, an employee of Defendant, First Interstate Bank of Alaska, made defamatory statements to at least one other person, stating that Lane + Knorr + Plunkett, Architects and Planners, was insolvent and about to close its doors; and that such statements were untrue and amounted to defamation per se; alternatively, the distress being suffered by Plaintiffs, had been as a direct and proximate result of the unlawful activities of Defendants, banks, and that said Defendants are estopped from asserting that the results of such unlawful activities are attributable to Plaintiffs.

20. That in or about January of 1984, Defendant, First Interstate Bank of

Alaska, seized funds on deposit by Plaintiffs, Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners; Lane + Knorr + Plunkett Investment Company; and Michael Plunkett, Inc.; ostensibly under the provisions of the aforesaid subsequent loans (see paragraph 15).

21. That nowhere had Michael Plunkett, Inc., ever been a party to the aforesaid loan agreements; and that said Defendant's First Interstate Bank of Alaska's, conduct in converting the Michael Plunkett, Inc. account funds, had been malicious and as part of the other ongoing unlawful conduct as aforesaid.

22. That as a direct and proximate result of the aforesaid acts and omissions on the part of the Defendants, and all of them, Plaintiffs, Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners; Lane + Knorr + Plunkett

Investment Company, also known as LKP Investment Company and Michael Plunkett, Inc.; have suffered and continue to suffer ongoing irreparable harm for which there is no complete and adequate remedy at law. In particular, Plaintiffs stand to lose valuable interests in the above-described real property; loss of reputation; disparagement of business reputation and relationships; have become involved in other foreseeable state litigation; and such other irreparable harm as shall be evidenced to the Court.

22. That as a direct and proximate result of the aforesaid acts and omissions on the part of the Defendants, said Defendants are jointly and severally liable to Plaintiffs in an amount in excess of ONE MILLION DOLLARS (\$1,000,000.00) the exact amount of which is to be determined at trial. Said

damages consist, without limitations, of (a) direct damages of usurious and/or overcharged sums for interest; (b) direct and compensatory damages for breach of contract; (c) consequential damages for Plaintiffs' foreseeable inability to meet their ongoing obligations as a result of the unlawful and unfair conduct on the Defendants' part; (d) treble damages under state and federal trade practices and anti-trust statutes (e) punitive and exemplary damages (f) actual legal fees, expenses and any damages incurred in other lawsuits forced upon Plaintiffs as a result of Defendants' conduct; (g) general compensatory damages for tortious conduct (h) damages for harm to individual and business reputation and disparagement (i) special damages for costs incurred by Plaintiffs to accountants, investigators, experts and other contractors and (j) such other general, special, compensatory,

statutory, consequential and other damages of any kind or type as shall be determined at trial.

23. That Defendants' conduct had been, and continues to be, so extreme, outrageous, willful and in bad faith that punitive and exemplary damages should be awarded in an amount to be determined at trial.

#### CLASS ALLEGATIONS

24. That if it is determined during discovery that a cognizable class of other persons and/or entities exists who had had improperly tied interest rates set pegged to a fraudulently represented or otherwise illegally determined interest rate by on or more of Defendants, banks, or have other common claims as herein alleged, the named Plaintiffs pray leave, if they so desire, to pursue the above-entitled action as a class action



under the Federal Rules of Civil Procedure, Rule 23.

25. That there exist common questions of law and fact to all of the class claims which sound under 15 U.S.C. 1 et seq. - especially, without limitation, 15 U.S.C. 1, 2, 13, 15, 18, and the related federal and state bases for relief; and that the claims or defenses of the class representatives are typical of the class and that, upon application for certification of a class action, the named parties shall be able and willing fully and adequately protect the interests of the class.

#### **FIRST CLAIM FOR RELIEF**

26. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 25 as if the same had been set forth herein in full.

27. That Defendants' conduct is violative of, and actionable under 15 Plunkett v. 1st Interstate Bank-Complaint

U.S.C. 1 et seq.; 15 U.S.C. 1601 et seq.;  
12 U.S.C. 214 and 1842 et rel.; and  
regulations promulgated by the Federal  
Trade Commission.

### **SECOND CLAIM FOR RELIEF**

28. That Plaintiffs incorporate by  
reference each and every allegation set  
forth in paragraphs 1 thru 27 as if the  
same had been set forth herein in full.

29. That Defendants' conduct is  
violative of, and actionable under A.S.  
45.45.010 et seq.; A.S. 45.50.471 et seq.;  
A.S. 45.50.562 et seq.; and Chapters 1, 5,  
and 10 of Title 6 of Alaska Statutes and  
the regulations promulgated thereunder.

### **THIRD CLAIM FOR RELIEF**

30. That Plaintiffs incorporate by  
reference each and every allegation set  
forth in paragraphs 1 thru 29 as if the  
same had been set forth herein in full.

31. That Defendants' conduct amounted

to a gross, material and egregious breach of contract; and that justice requires the Court to intervene between the parties so as to provide injunctive and declaratory relief to protect the name Plaintiffs.

32. That as a direct and proximate result of said breach of contract, the named, and class (if applicable), Plaintiffs have suffered damages as aforesaid; and justice requires Court intervention in order to make the named, and class (if applicable), Plaintiffs whole.

#### FOURTH CLAIM FOR RELIEF

33. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 32 as if the same had been set forth herein in full.

34. That Defendants' conduct is violative of, and actionable as a fraudulent misrepresentation upon which Plaintiffs had reasonably relied to their

Plunkett v. 1st Interstate Bank-Complaint

detriment.

#### **FIFTH CLAIM FOR RELIEF**

35. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 34 as if the same had been set forth herein in full.

36. That Defendants' conduct is violative of, and actionable as a conspiracy on the part of Defendants upon which Plaintiffs had suffered damages as aforesaid.

#### **SIXTH CLAIM FOR RELIEF**

37. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 36 as if the same had been set forth herein in full.

38. That Defendants' conduct is violative of, and actionable to the extent that any one or more of the Defendants had tortiously interfered with the contract rights of the Plaintiffs.

### SEVENTH CLAIM FOR RELIEF

39. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 38 as if the same had been set forth herein in full.

40. That Defendants' conduct is violative of, and actionable to the extent that any one or more of the Defendants had defamed any one or more of the Plaintiffs; and/or Defendants had unlawfully disparaged any one or more of the Plaintiffs' in operation and conduct of those Plaintiffs' businesses and/or otherwise subjected Plaintiffs to injurious falsehood.

### EIGHTH AND OTHER CLAIMS FOR RELIEF

41. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 40 as if the same had been set forth herein in full.

42. That in addition to the above-described claims for relief,

Defendants' conduct amounts to prima facie torts of various descriptions, including without limitation gross negligence, recklessness, conspiracy, wrongful foreclosure, usury, tortious breach of contract and others. To the extent that Plaintiffs' Complaint requires amendment to plead these claims with greater specificity, Plaintiff's pray for such relief to amend.

**WHEREFORE** Plaintiffs pray for judgment and for relief as follows:

I. For speedy permanent and temporary injunctive relief preventing and the foreclosure sale of the above-described real properties and

II. Alternatively, if the Court does not enjoin the foreclosure sale of said real properties, for damages (enhanced to the extent permitted by law) for Plaintiffs' losses of equity and other

damages shown in addition to all other damages requested herein; and

III. For such other speedy permanent and temporary injunctive and declaratory relief as shall be necessary and advisable to protect interests of the Plaintiffs from suffering existing, ongoing or future irreparable harm, and to fully set forth the rights of the parties; and

IV. For the individual, (and class if applicable), Plaintiffs to be awarded against Defendants, jointly and severally, as applicable, general, special, compensatory, statutory, consequential, punitive, treble, and other damages of any kind or type in an amount in excess of ONE MILLION DOLLARS (\$1,000,000.00) as shall be determined at trial; and

V. For interest to be awarded both before and after judgment; and

VI. For the Court to recognize the public interest impact of any decision in Plunkett v. 1st Interstate Bank-Complaint



the above-entitled action; and for the Court to award Plaintiff his costs of suit and reasonable and actual attorneys' fees at the prevailing rate in the community under 42 U.S.C. 1988 or otherwise as applicable together with interest thereupon until paid alternatively for costs and reasonable attorneys' fees and interest as a substantive right under the Alaska Civil Rule 82 and A.S. 09.60.010 or otherwise under state or federal law; and

VII. For such further and other relief as the Court may deem just and equitable under the circumstances.

**RESPECTFULLY SUBMITTED** this \_\_\_\_\_  
day of September 1984.

\_\_\_\_\_  
Michael E. Plunkett, pro se

\_\_\_\_\_  
George E. Weiss,  
Attorneys for Plaintiffs Lane + Knorr +  
Plunkett, Architects and Planners; Lane +  
Knorr + Plunkett, Investment Company, also  
known as LKP Investment Company; and  
Michael Plunkett, Inc.

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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett; Lane+Knorr+)  
Plunkett, Architect and Planners; )  
Lane+Knorr+Plunkett Investment ) REVISED  
Company; ) SECOND  
 ) AMENDED  
v. ) COMPLAINT  
 )  
First Interstate Bank of Alaska, ) No. A84-387  
formerly, Alaska Bank of ) Civil  
Commerce, First Interstate )  
Bancorp; First Interstate Bank ) 5 Exhibits  
of Oregon, formerly First ) Jury Trial  
National Bank of Oregon; ) Demanded  
 ) Complex  
 ) Case

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Come now Plaintiffs, Michael E.  
Plunkett, pro se, on his own behalf and on  
behalf of his partnership interest in Lane  
+ Knorr Plunkett, Architects and Planners,  
("LKP") and Lane + Knorr + Plunkett  
Investment Company, also known as LKP  
Investment Company, Alaskan general  
partnerships, and complain of Defendants  
alleging as follows:

## JURISDICTIONAL STATEMENT

1. That jurisdiction is conferred herein by virtue of the following provisions of law: 28 U.S.C. 1331 - (Federal question), 28 U.S.C. 1332 (diversity action), 15 U.S.C. 1 et seq., especially, without limitation, 15 U.S.C. 1, 2, 13, 15 and 18; federal and state laws regulating the practice of banking institutions; 12 U.S.C. 1 et seq, AS 06.01-.40 et seq., 18 U.S.C. 1961-1968, A.S. 45.45.010 et. seq. (if applicable), 28 U.S.C. 2201-2202; Federal Civil Rule 65; Federal Civil Rule 23; A.S. 11.76.110; A.S. 45.45.010 et seq. A.S. 45.50.471 et seq.; A.S. 45.50.576; A.S. 45.50.562 et seq.; Chapters 1, 5 and 10 of Title 6 of Alaska Statutes A.S. 09.60.010 and Alaska Civil Rule 82 and by virtue of the doctrines of pendant and ancillary jurisdiction 28 USCS Section 1441(c) - see

e.g. United Mine Workers v. Gibbs (1966) 383 U.S. 715, 725, 16 L.Ed. 2d 218, 228, 86 S.Ct. 1130, 1138; and that jurisdiction exists under other provisions of federal and state law.

2. That justice requires Federal Court recognition of the pendant and ancillary claims under state law to the extent that such claims might be compulsory claims which could be precluded by the doctrines of merger and bar, res judicata or collateral estoppel upon any judgment which is entered in this action.

## II PARTIES

### A. Plaintiffs

3. (a) That Plaintiff, Michael E. Plunkett, is an Alaska resident, and is an individual who has suffered direct and indirect harm as a result of the Defendants' conduct described herein; (b) that Plaintiff, Lane + Knorr + Plunkett, Architects and Planners, is a partnership

comprised of Michael E. Plunkett and either Donald R. Knorr or Don Knorr Associates, a California corporation; (c) That Plaintiff, Lane + Knorr + Plunkett Investment Company, is a partnership comprised of Michael E. Plunkett and Donald R. Knorr; (d) that Plaintiff, LKP Investment Co. is a d/b/a under which Plaintiff, Lane+Knorr+Plunkett Investment Company is and has been operating; (e) that to the extent that there are any conditions precedent to the filing of this suit, or any lawful requirement which may be necessary for the bringing of this lawsuit, said conditions precedent have been met and (f) that Plaintiffs are fully competent to bring this action in any case.

#### DEFENDANTS

4. That Defendants, First Interstate Bank of Alaska, formerly, Alaska Bank of

Commerce (hereinafter "FIBA"); First Interstate Bank Corporation (hereinafter "FIBC"); First Interstate Bank of Oregon (hereinafter "FIBO"), formerly, First National Bank of Oregon (all said banks or banking corporations are hereinafter referred to as Defendants, "banks" or "the banks") are domestic and foreign bank corporations which engage in interstate commerce, and which are doing business in Alaska and/or doing business outside Alaska which is affecting business which had occurred, and is occurring, in Alaska.

5. Defendant First Interstate Bank of Oregon, N.A. ("FIBO"), is a national banking association, with its principal place of business in the state of Oregon. Defendant First Interstate Bank of Oregon was formerly known as First National Bank of Oregon and, whenever reference is made to "FIBO", such reference shall be deemed to include the corporation and its

predecessor, first National Bank of Oregon.

6. Defendant First Interstate Bancorp ("FIBC") is a California Corporation doing business in the state of Oregon and a bank holding company which owns First Interstate of Oregon and has its principal place of business in Los Angeles, California. Defendant FIBC was formerly known as Western Bancorp and whenever reference is made to defendant FIBC, such reference shall be deemed to include the corporation and its predecessor, Western BanCorp.

#### GENERAL ALLEGATIONS

7. That during the years 1980, and 1981, the Plaintiff LKP Investment Company entered into an agreement with Defendant, First Interstate Bank of Alaska, then known as Alaska Bank of Commerce, for purposes of obtaining



financing of the construction of the building now located at 600 Barrow Street in Anchorage, Alaska. The loan principal amount of \$1,667,000.00 had an interest rate determined at three and one half percent above the prime rate, which had been defined as the prime rate charged by the First National Bank of Oregon, Portland, Oregon, to its most credit worthy borrowers. (Exhibit 2 page 1).

8. That in February 11, 1982, in order to complete construction of the 600 Barrow Building, Plaintiff LKP Investment Company executed a second Deed of Trust Note, also based on a rate of interest of 3.5 points above the fraudulent prime rate advertised by FIBO as the rate charged FIBO's most credit worthy borrowers. Said note was for the principal sum of \$355,600 dollars. Plaintiff Michael E. Plunkett was a guarantor of said note as well. Plaintiffs paid all principal and interest due on

said note. Said note was paid in full in fall 1983.

9. That in May of 1984, the United States District Court For the District of Oregon, in three companion cases, Wilcox Development Co. et al v. First Interstate Bank of Oregon et al, Civil Case No. 81-1127-RE; A. C. Distribution Co., Inc. et al v. Pacific Western Bank et al, civil Case No. 81-1128 RE; and Kunkle v. First Interstate Bank of Oregon et al, Civil Case No. 82-754 RE, it was undisputed in its Judgment Notwithstanding Verdict Wilcox Development v. First Interstate Bank of Or. 605 F Supp 592-597 (D.C. OR 1985) that Defendants, First Interstate Bank Corporation and First Interstate Bank of Oregon, formerly, First National Bank of Oregon, had been engaged in the practice of discounting (below the published "prime" rate) of over 2500

loans and that FIBO utilized the "count of 4" method in determining its prime rate.

10. That Defendants, banks, are estopped and barred from asserting the legality of their discounting and prime rate setting practices as alleged in the present case (a) because of the anti-competitive tying relationships between the FIBA and the FIBO and FIBC; (b) because of the contractual and other relationships as existed between the Alaska and the out of state banks; (c) to the extent it is determined that the Alaska and the out of state banks acted as agents and representative for one another; (d) that to the extent it is determined that the Oregon or other foreign banks acted as the 'alter ego' for the Alaska banks; (e) that to the extent that it is determined that a conspiracy to set interest rates in violation of federal and state antitrust and trade practices laws

(and in violation of Plaintiffs rights as otherwise complained of herein) existed among the Defendants, banks, and among Defendants, banks, and others; and (f) and because it would violate fundamental concepts of fairness and justice to permit the Alaska banks to profit from illegal activity on the part of others with whom the Alaska banks had acted in concert as herein alleged.

11. That Plaintiffs suffered direct damages as a result of the interest overcharges, usury (if applicable), (said loans were secured by personal property in addition to real property), and other unlawful activity of the Defendants in a sum in excess of FIFTY THOUSAND DOLLARS (\$50,000) (based on an average overcharge of 3% and multiples interest if in fact the rate charged FIBO most credit worthy borrowers was, on information and belief

6% verses the 21.5% "prime rate" charged plaintiffs at one point, plus over \$70,000 in lost equity on foreclosed properties, the exact amount of which is to be determined at trial; and that Plaintiffs suffered consequential damages as elsewhere alleged and in particular in the form of impaired cash flow, foreclosures, loss of equity, loss of leasability, resulting in Plaintiffs' inability to meet their ongoing obligations.

12. That the aforesaid loan agreements between Plaintiffs Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners, Lane + Knorr + Plunkett Investment Company, also known as LKP Investment Company and Defendants, First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, had been, secured (inter alia) by a deed or deeds of trust on the real property located in Anchorage, Alaska, in the Anchorage Recording

District, Third Judicial District, State of Alaska, and better described as:

PARCEL No. 1:

RESIDENTIAL UNIT E, 600 Barrow Street, a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on 10 February 1982 as Plat No. 82-20, as identified in the Declaration recorded 10 February 1982, in book 697 at Page 942, in the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH and undivided 8.574 % interest in the common areas being Lot 1, Block 110, Original Townsite of Anchorage, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

PARCEL No. 2

UNIT No. A-5, SEACLIFF TERRACE CONDOMINIUM, as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on 22 June 1977 under File No. 77-107, and identified in Declaration Submitting Real Property to the Horizontal Property Regimes Act for the State of Alaska, recorded 22 June 1977, in Book 203 at Page 754, TOGETHER WITH the right to the exclusive use of Deck Space designated as AD-5; the Parking Space designated as AP-5; and the Storage Space designated as AS-5.

TOGETHER WITH an undivided 2.98% interest in the common areas and facilities appurtenant to Unit A-5, as set forth in said Declaration.

13. That Defendant, First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, by and through the trustee,



Alaska Title Guaranty Agency, Inc., foreclosed and sold the above-described real property on 12 September 1984 at a foreclosure sale in Anchorage, Alaska; and that Plaintiffs have suffered irreparable harm and loss unique and valuable interests in the real property as a result of at least \$70,000 in equity an amount to be proven at trial.

14. At the time of the notice of default under the notes and deeds of trust, Plaintiffs had allegedly been in arrears to the Defendants, First Interstate Bank of Alaska for a sum of about \$10,000.00, far less than the unlawful overcharges assessed by Defendants as aforesaid.

15. That in addition, the following properties are in default and in the process of judicial foreclosure as a proximate result of the excessive interest rates charged and the funds paid in

excessive interest not now available for mortgage payments or loan funds unavailable for tenant improvements, advertising and/or rent subsidies and/or draws available to partner Michael E. Plunkett to meet major committments of his personal residence:

PARCEL I:

COMMERCIAL UNIT NO. 1, 600 BARROW, a condominium as shown on the floor plans filed in the office of the Anchorage recorder for the Anchorage Recording District, Third Judicial ldistrict, State of Alaska, on February 10, 1982 in book 697 at page 942 in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH an undivided 3.178% interest in the common areas, being Lot 1, Block 110, ORIGINAL TOWNSITE OF ANCHORAGE, records of the Anchorage Recording District, Third Judicial District, State

of Alaska.

TOGETHER WITH the exclusive right to use those certain limited common areas and facilities as set forth in said Declaration.

PARCEL II:

COMMERCIAL UNIT NO. 2, 600 BARROW, a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on February 10, 1982 as Plat No. 82-20 and as identified in the Declarations recorded February 10, 1982 in book 697 at page 942 in the records of the Anchorage Recording district, Third Judicial District, State of Alaska.

TOGETHER WITH an undivided 29.484% interest in the common areas, being Lot 1, Block 110, ORIGINAL TOWNSITE OF ANCHORAGE, records of the Anchorage Recording

District, Third Judicial District, State of Alaska.

TOGETHER WITH the exclusive right to use those certain limited common areas and facilities as set forth in said Declaration.

PARCEL III:

COMMERCIAL UNIT NO. 3, 600 BARROW, a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on February 10, 1982 as Plat No. 82-20, and as identified in the Declarations recorded February 10, 1982 in book 697 at page 942 in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH an undivided 25.117% interest in the common areas, being Lot 1, Block 110, ORIGINAL TOWNSITE OF ANCHORAGE, records of the Anchorage Recording

District, Third Judicial District, State of Alaska.

TOGETHER WITH the exclusive right to use those certain limited common areas and facilities as set forth in said Declaration.

PARCEL IV:

Lot Three, Block One Hundred eleven, ANCHORAGE TOWNSITE, records of the Anchorage Recording District, Third Judicial District, State of Alaska,

PARCEL V:

Residential Unit No. F, 600 Barrow, A condominium as shown on the floor plans filed in the office of the Anchorage recorder for the Anchorage Recording District, third Judicial District, State of Alaska on February 10, 1982 in Book 697 at Page 942 in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

Together with an undivided 8.175% interest in the common areas being lot 1, Blk. 110 Original Townsite of Anchorage, records of the Anchorage Recording District, Third Judicial District, State of Alaska.

Together with the exclusive right to use those certain limited common areas and facilities as set forth in said declaration.

16. That in addition, the following property was foreclosed by FIBA and a Deed of Trust holder in Homer as a consequence of interest overcharge which made unavailable funds to support vacancy on former residence and installment payments on real property purchase in Homer:

PARCEL VI:

Unit No. 12 of POTLATCH CIRCLE TOWNHOUSE, CONDOMINIUMS, identified in that certain Declaration submitting Real Property to the Horizontal Property

Regime, recorded August 20, 1979, in the Anchorage Recording District in official records, Book 428 at Page 925, and amendments thereto recorded January 28, 1980 in Book 468 at Page 837; June 2, 1980 in Book 499 at Page 427; July 29, 1980 in Book 511 at Page 680; August 25, 1980 in Book 519 at page 273 and September 3, 1980 in Book 521 at Page 904 and September 30, 1980 in book 530 at Page 325 and as shown and described on those certain Survey Maps and Floor Plans filed under Plat No. 79-132, Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH an undivided 2.3672 percent interest in the Common Areas and Facilities for POTLATCH CIRCLE TOWNHOUSES, CONDOMINIUMS being TRACTS A, B, C, D and G POTLATCH CIRCLE SUBDIVISION, according to, the official plat thereof, filed under Plat No. 79-89 and TRACTS A, B, C, D and G



POTLATCH CIRCLE SUBDIVISION, according to the official plat thereof, filed under Plat No. 79-89 and TRACTS E-1 AND F-1, POTLATCH CIRCLE SUBDIVISION, according to the official plat thereof, filed under Plat No. 80-81 in the records of the Anchorage Recording District, Third Judicial District, State of Alaska and as shown and described on such Survey Map(s) and Floor Plan(s) and Declaration and Amendments thereto and together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including the Limited Common Areas and Facilities appurtenant and reserved for the use of such Unit to the exclusion of other Units of POTLATCH CIRCLE TOWNHOUSES CONDOMINIUMS, as described on such Survey Map(s), Floor Plan(s), Declaration and Amendments thereto.

PARCEL VII:

Tract A, ISLAND VIEW SUBDIVISION, according to Plat 77-65, in the Homer Recording District, Third Judicial District, State of Alaska. NOW DESCRIBED AS; Tract B, ISLAND VIEW SUBDIVISION UNIT 2, according to Plat No. 83-106, in the Homer Recording District, Third Judicial District, State of Alaska.

17. That as a result of the illegal and/or tortious conduct and contract breaches on the part of the Defendants, Plaintiffs, Michael E. Plunkett and Lane + Knorr + Plunkett, Investment Co. and Lane + Knorr + Plunkett, Architects and Planners, had been forced to incur additional indebtednesses, at least one said loan executed in early 1982 by LKP Investment Company for additional construction funds for the 600 Barrow Street Project had been pegged to the illegal and fraudulent prime rate; and

that additional direct and consequential damages had been incurred thereby.

18. That the illegal published "prime" rate which the Defendants, banks, based rates which had been charged to the Plaintiffs, had been, and is discriminatory and anti-competitive.

19. That upon information and belief, all or some of the Defendants, banks, had unlawfully colluded and conspired at various times with unnamed co conspirators of other Alaska Banks, to deprive Plaintiffs of additional loans, which would have relieved the distress in which Defendants had placed Plaintiffs.

20. That plaintiffs applied for additional financing at virtually every commercial bank in Anchorage in 1984 in an attempt to relieve said financial distress, with virtually identical denial from each said unnamed coconspirator banks and/or bank officials.

21. That Plaintiffs had not been aware, and could not reasonably have become aware, of the unlawful activities of the Defendants until the decision of the Jury in the Oregon Court had been reported in the newspaper in May 1984.

22. That in or about February of 1984, Frank Kauffman, an employee of Defendant, First Interstate Bank of Alaska, made defamatory statements to at least one other person, stating that Lane + Knorr + Plunkett, Architects and Planners, was insolvent and about to close its doors; and that such statements were untrue and amounted to defamation per se; alternatively, the distress being suffered by Plaintiffs, had been as a direct and proximate result of the unlawful activities of Defendants, banks, and that said Defendants are estopped from asserting that the results of such

unlawful activities are attributable to Plaintiffs.

23. That in or about January of 1984, Defendant, First Interstate Bank of Alaska, seized funds on deposit by Plaintiffs, Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners; Lane + Knorr + Plunkett Investment Company; and Michael Plunkett, Inc. a corporation at which time was wholly owned by Michael E. Plunkett; ostensibly under the provisions of the aforesaid subsequent loans .

24. That nowhere had Michael Plunkett, Inc., ever been a party to the aforesaid loan agreements; and that said Defendant's, First Interstate Bank of Alaska's, conduct in converting the Michael Plunkett, Inc. account funds, had been malicious and as part of the ongoing unlawful conduct as aforesaid.

25. That as a direct and proximate

result of the aforesaid acts and omissions on the part of the Defendants, and all of them, Plaintiffs, Michael E. Plunkett; Lane + Knorr + Plunkett, Architects and Planners; Lane + Knorr + Plunkett Investment Company, also known as LKP Investment Company; have suffered and continue to suffer ongoing irreparable harm for which there is no complete and adequate remedy at law. In particular, Plaintiffs have lost and/or stand to lose valuable interests in the above-described real property; loss of reputation; disparagement of business reputation and relationships; have become involved in other foreseeable state litigation; and such other irreparable harm as shall be evidenced to the Court.

26. That as a direct and proximate result of the aforesaid acts and omissions on the part of the Defendants,

said Defendants are jointly and severally liable to Plaintiffs in an amount in excess of ONE MILLION DOLLARS (\$1,000,000.00) the exact amount of which is to be determined at trial. Said damages consist, without limitation, of (a) direct damages of usurious and/or overcharged sums for interest; (b) direct and compensatory damages for breach of contract; (c) consequential damages for Plaintiffs' foreseeable inability to meet their ongoing obligations as a result of the unlawful and unfair conduct on the Defendants part; (d) treble damages under state and federal trade and anti-corruption practices and anti-trust statutes; (e). punitive and exemplary damages; (f) actual legal fees, expenses and any damages incurred in other lawsuits forced upon Plaintiffs as a result of Defendants' conduct; (g) general compensatory damages for tortious conduct;



(h) damages for harm to individual and business reputation and disparagement; (i) special damages for costs incurred by Plaintiffs to accountants, investigators, experts and other contractors; and (j) such other general, special, compensatory, statutory, consequential and other damages of any kind or type as shall be determined at trial.

27. That Defendants' conduct had been, and continues to be, so extreme, outrageous, willful and in bad faith that punitive and exemplary damages should be awarded in an amount to be determined at trial.

#### FIRST CLAIM FOR RELIEF

28. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 27 as if the same had been set forth herein in full.

29. That Defendants' conduct is

violative of, and actionable under 15 U.S.C. 1 et seq.;

30. Other persons not made defendants herein have participated as coconspirators with defendants in the illegal acts and transactions set forth herein.

31. For many years past, the exact date being presently unknown to plaintiffs, and continuing up to and including the date of filing of this complaint, defendants, and coconspirators have engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. Par. 1.

32. The aforesaid combination and conspiracy have consisted of a continuing agreement, understanding and concert of action among the defendants and unnamed coconspirators, to deny plaintiffs loans and to agree to the substantial terms of which have been to raise, fix, stabilize

and maintain the interest rate charged by lending institutions on a loan or use of money including but not limited to setting by agreement a published/or "prime" rate based on "count of four" and then contracting with FIBA who contracted with plaintiffs, knowing this "count of four" rate was not the rate charged its most credit worthy borrowers.

33. At all times material, the denial of loans by defendant FIBA and coconspirators and the interest rate held out by FIBA and/or FIBO to be its prime rate was not based upon defendants cost of funds or other legitimate business reason but was announced and imposed by defendants pursuant to the aforesaid illegal combination and conspiracy.

34. In furtherance of the aforesaid combination and conspiracy, the defendants and coconspirators did various acts.

including acts to raise, fix, stabilize and maintain the interest rate charged by lending institutions on a loan or use of money.

35. The aforesaid offense has had the following effects, among others:

a. The "prime rate" has been raised, fixed, stabilized and maintained at noncompetitive levels;

b. The interest rates charged by lending institutions have been raised, fixed, stabilized and maintained at noncompetitive levels;

c. Price competition on loans or uses of money between lending institutions has been suppressed;

d. Plaintiffs have been denied the opportunity of obtaining loans or uses of money in a free and competitive market.

46. Plaintiffs and members of the class they represent had no knowledge of the combination and conspiracy in denying loan

and/or in using the "rate of 4" method to determine prime rate and FIBA setting of its prime rate on face of loan instruments alleged herein, or any facts which may have led to the discovery thereof until on or about the date of Judgment Notwithstanding Verdict decision in Oregon cases appeared in late 1984. Plaintiffs and members of the class could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by defendants and unnamed coconspirators to avoid detection and fraudulently conceal such combination and conspiracy such as "Rule of 4" method of determining prime rate. Plaintiffs detrimentally relied on prime rate of FIBO being a competitive noncollusive rate, directly tied to cost of funds, and prime rate as defined on the

note as the rate charged most credit worthy borrowers of FIBO.

37. By reason of defendants' conspiracy herein-above alleged, plaintiffs paid interest on First Interstate obligations at a rate higher than the rate which plaintiffs would have had to pay under natural conditions of competition in the absence of such conspiracy. Plaintiff and members of the class have thereby suffered substantial injury and damage. Plaintiffs are unable to totally ascertain their damage with precision at this time other than as outlined above. Such determination will require discovery and analysis of defendants' books and records.

#### SECOND CLAIM FOR RELIEF

38. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 37 as if the same had been set forth herein in full.

39. That Defendants' conduct is

violative of, and actionable under A.S. 45.45.010 et. seq.(if applicable), A.S. 45.50.471 et seq.; A.S. 45.50.562 et seq; AS.45.50.576; AS 06.05.145 of Title 6 of Alaska Statutes and the regulations promulgated thereunder. Plaintiffs are entitled to treble damages pursuant to AS 45.50.531.

### THIRD CLAIM FOR RELIEF

40. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 39 as if the same had been set forth herein in full.

41. That Defendants' conduct amounted to a gross, material and egregious breach of contract; and that justice requires the Court to intervene between the parties so as to provide injunctive and declaratory relief to protect the named Plaintiffs.

42. That as a direct and proximate result of said breach of contract, the



named, and class, Plaintiffs have suffered damages as aforesaid; and justice requires Court intervention in order to make the named, and class, Plaintiffs whole.

#### FOURTH CLAIM FOR RELIEF

43. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 42 as if the same had been set forth herein in full.

44. That Defendants' conduct is violative of, and actionable as a fraudulent misrepresentation upon which individual and class Plaintiffs' had reasonably relied to their detriment.

#### FIFTH CLAIM FOR RELIEF

45. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 44 as if the same had been set forth herein in full.

46. That Defendants' conduct is violative of, and actionable as a conspiracy on the part of Defendants upon

which individual and class Plaintiffs had suffered damages as aforesaid.

SIXTH CLAIM FOR RELIEF

47. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 46 as if the same had been set forth herein in full.

48. That Defendants' conduct is violative of, and actionable to the extent that any one or more of the Defendants had tortiously interfered with the contract rights of class and/or individual Plaintiffs.

SEVENTH CLAIM FOR RELIEF

49. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 48 as if the same had been set forth herein in full.

50. That Defendants' conduct is violative of, and actionable to the extent that any one or more of the Defendants had

defamed any one or more of the Plaintiffs;  
and/or Defendants had unlawfully  
disparaged any one or more of the  
Plaintiffs in the operation and conduct of  
those Plaintiffs' businesses and/or  
otherwise subjected Plaintiffs to  
injurious falsehood.

#### EIGHTH CLAIM FOR RELIEF

51. That Plaintiffs incorporate by  
reference each and every allegation set  
forth in paragraphs 1 thru 50 as if the  
same had been set forth herein in full.

52. At all times material, FIBO has  
publicly announced a lending rate, which it  
holds out to be its "prime rate."

53. At all times material, FIBO & FIBA  
has pursued a policy of making  
announcements from time to time to the  
press, its borrowers, and members of the  
public at large that it had altered or was  
going to alter its "prime rate." In such  
public announcements, frequently timed to

follow similar announcements by other major banks, FIBO & FIBA announced a specific rate which it held out to be its then-existing "prime rate."

54. For many years past, the exact date being presently unknown to Plaintiffs, but, at all times material and continuing up to and including the date of filing of this complaint, defendants conceived of a plan and scheme to defraud Plaintiffs .

55. In furtherance of defendants' plan and scheme to defraud Plaintiffs , FIBO, FIBC, FIBA fraudulently and intentionally led Plaintiffs to believe and to rely upon representations that the "prime rate" was the most favorable lending rate offered by FIBO to its most credit worthy borrowers.  
(exhibit 2 page 1)

56. At all times material, Plaintiffs did believe and rely upon Defendants' representations that the "prime rate"

announced by FIBO and FIBA was in fact the lowest rate available to FIBO's most credit worthy borrowers.

57. At all times material, FIBA charged interest on plaintiffs' Deed of Trust Notes at 3.5 percent in excess of the rate publicly announced as FIBO "prime rate."

58. At all times material up until the time of default on principal note balance in fall 1983, Plaintiffs made payments on such promissory notes, the interest on which was calculated at 3.5 percent in excess of the rate collectively stated by FIBO & FIBA to be the "prime rate."

59. At all times material, the rate which was publicly announced by FIBO & FIBA as the "prime rate" was not in fact the lowest rate which FIBO charged its most credit worthy borrowers.

60. At all times material, in furtherance of Defendants' plan and scheme to defraud, loan statements and other

information incorporating the fraudulent "prime rate" were disseminated to Plaintiffs by Defendants on a monthly basis.

61. At all times material, Defendants periodically and continuously made use of the United States Mails and interstate telephone wire services in interstate commerce in furtherance of its plan and scheme to defraud Plaintiffs. (Exhibits 4 and 5 hereto)

62. Defendants' exaction of interest based upon a fraudulent prime rate constitutes a "racketeering activity" within the meaning of 18 U.S.C. Par. 1961(1) and within 18 U.S.C. Par. 1961(5) relating to a pattern of racketeering activity.

63. That Defendants FIBA, FIBO, FIBC each constitute a "person" as defined in 18 U.S.C. Section 1961(3) and an

"enterprise" as defined in 18 U.S.C. Section 1961 (4).

64. FIBA, FIBO, and/or FIBC have benefited both directly and indirectly by the pattern of racketeering activity through investment of the proceeds of the racketeering activity in their operations which effect interstate commerce in violation of 18 U.S.C. Section 1962(a).

65. That defendants FIBA, FIBO, and FIBC have used the proceeds of said racketeering activities to acquire, maintain and/or control their interest(s) in the enterprise(s) which are engaged in and whose activities effect interstate commerce in violation of 18 U.S.C. Section 1962(b). That specifically FIBC used proceeds from its pattern of racketeering activity to acquire and/or control First National Bank of Oregon and FIBA used the proceeds of the racketeering activity to establish itself as a franchisor of FIBC.



66. That the collusion between FIBO, FIBA and/or FIBC in furtherance of the continuing pattern and scheme to defraud Plaintiffs in violation of 18 U.S.C. Section 1962(a) and (b) constitutes a violation of 18 U.S.C. Section 1962 (d).

67. That Defendant FIBA used United States Mail and/or caused use of United States Mails in furtherance of Defendants FIBA, FIBO and FIBC scheme to defraud Plaintiffs by mailing a loan and interest statement to Plaintiffs each and every month after closing the loans based on the FIBO prime rate, said statements listed the interest rate charged for the preceeding month, said rate being the sum of the fraudulent "prime" rate and the 3.5% or other upcharge as called for in the Deed of Trust Note and/or other loan instruments. Said use of the United States Mail was for the specific intent to

deceive and/or defraud Plaintiffs as to the true "prime" rate. Said use of the U.S. Mail was part of a continuing plan and scheme to defraud Plaintiffs and was in violation of 18 U.S.C. Par. 1341 and 18 U.S.C. Sections 1962 (a), (b), and/or (d).

68. That on at least two occasions in 1982 and/or January 14, 1983 Plaintiff Michael E. Plunkett caused Lane + Knorr + Plunkett employee to use interstate telephone lines to telephone FIBO to ascertain the "prime" rate advertised by FIBO during each month of the period of the loans. (Exhibit 4 hereto). FIBO employee, in furtherance of the scheme to defraud Plaintiffs, verified the "prime" rate as the numerical difference between the rate charged for the preceeding month and the 3.5% upcharge per Deed of trust Note. On information and belief, defendants FIBO, FIBA, and FIBC further caused use of interstate wires and

telephones with the specific intent to further the scheme to defraud Plaintiffs. Defendants' use of the interstate wires and/or interstate telephones was part of their continuing plan and scheme to defraud Plaintiffs and was in violation of 18 U.S.C. Section 1343 and 18 U.S.C. Sections 1962 (a), (b), and/or (d).

69. That Defendant FIBA caused and/or is responsible under doctrine of respondent superior for FIBA employee Kauffman's defamatory and disparaging statement of paragraph 32 of above. Said Defendant FIBA acts are violative of 18 U.S.C. 1951 and/or Section 1952(b), A.S.11.41.530 (a) (3) (Extortion) and is actionable as a continuing pattern of extortion to defraud Plaintiffs of their property and constitutes racketeering activity pursuant to 18 U.S.C. Section 1961(1)(B) and 18 U.S.C. Section 1962(a)(b) and/or (d).

70. If and to the extent statement by Bill Burk of Rogers & Babler to Ben Garland, employee of plaintiff, on or about 17 May 1982 is true that Defendant banker (FIBA) stated Lane + Knorr + Plunkett was about bankrupt or words to that effect, said defamatory and untrue statements also constitutes a pattern of attempted extortion. Said attempted extortion is part of a continuing pattern of racketeering activity to defraud Plaintiff of their property per 18 U.S.C. Section 1961(1) and are actionable pursuant to 18 U.S.C. 1962(a)(b) and/or(d).

71. If and to the extent FIBA caused and/or provided information to other unnamed coconspirators banks to effectuate denial of .loans to Plaintiffs for the purpose of guaranteeing property through foreclosure said acts are a violation of AS11.41.520(a)(3),(5) and/or (7) and are actionable as a continuing pattern of

racketeering activity per 18 U.S.C. section 1951 and/or 1952(b) and is actionable as a racketeering activity pursuant to 18 U.S.C. 1961(a)(b) and 18 U.S.C. 1962(a)(b) and/or (d).

72. If and to the extent FIBA directive to illegally notarize after the fact a Uniform Commercial Code filing in conjunction with one or more loans to Plaintiffs constitutes a racketeering activity per 18 U.S.C. 1961 said is actionable as a pattern of continuing racketeering activity to defraud Plaintiffs of their property per 18 U.S.C. 1962(a)(b) and/or (d).

73. Plaintiffs had no knowledge of the unlawful plan and scheme alleged herein, or any facts which may have led to the discovery thereof until on or about the date of newspaper report of Jury trial in May 1984. Plaintiffs could not have

discovered the unlawful plan and scheme at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by Defendants to avoid detection and fraudulently conceal such unlawful plan scheme.

74. As a direct and proximate result of the Defendants' unlawful conduct, Plaintiffs have sustained substantial damages in an amount as yet unascertained. Such determination will require discovery and analysis of Defendants' books and records.

#### NINTH CLAIM FOR RELIEF

75. That Plaintiffs incorporate by reference each and every fact, statement and allegation in Paragraphs 1-74 as if the same had been set forth fully herein.

76. That Defendants' conduct is violative of, and actionable as interference with prospective business

opportunities of Plaintiffs, conspiracy to interfere with Plaintiffs' prospective business opportunities, breach of Defendants' implied covenant of good faith and fair dealing and/or breach of Defendants' fiduciary duty to Plaintiffs.

#### TENTH CLAIM FOR RELIEF

77. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 76 as if the same had been set forth herein in full.

78. That one or more Defendants conduct is violative of and actionable as intentional infliction of economic hardship upon Plaintiffs, intentional infliction of emotional distress upon Plaintiff Michael E. Plunkett, conspiracy to intentionally inflict economic hardship upon Plaintiffs, and/or conspiracy to intentionally inflict emotional distress upon Plaintiff.



## ELEVENTH AND OTHER CLAIMS FOR RELIEF

89. That Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 thru 88 as if the same had been set forth herein in full.

90. That in addition to the above-described claims for relief, Defendants' conduct amounts to prima facie torts of various descriptions, including without limitation gross negligence, recklessness, conspiracy, wrongful foreclosure, usury, tortious breach of contract and others. To the extent that Plaintiffs' Complaint requires further amendment to plead these claims with greater specificity, Plaintiff's pray for such relief to amend.

WHEREFORE Plaintiffs pray for judgment and for relief as follows:

I. For speedy permanent and temporary injunctive relief preventing the judicial foreclosure sale of the above-described

real properties and

II. Alternatively, if the Court does not enjoin the pending foreclosure of said threatened properties, for damages (enhanced to the extent permitted by law) for Plaintiffs' losses of equity and other damages shown in addition to all other damages requested herein; and

III. For such other speedy permanent and temporary injunctive and declaratory relief as shall be necessary and advisable to protect interests of the Plaintiffs from suffering existing, ongoing or future irreparable harm, and to fully set forth the rights of the parties; and

IV. For the individual Plaintiffs to be awarded against Defendants, jointly and severally, as applicable, general, special, compensatory, statutory, consequential, punitive, treble, and other damages of any kind or type in an amount

in excess of ONE MILLION DOLLARS (\$1,000,000.00) as shall be determined at trial; and

V. For interest to be awarded both before and after judgment; and

VI. For the Court to recognize the public interest impact of any decision in the above-entitled action; and for the Court to award Plaintiff his costs of suit and reasonable and actual attorneys' fees at the prevailing rate in the community under 42 U.S.C 1988 or otherwise as applicable together with interest thereupon until paid; alternatively for costs and reasonable attorneys' fees and interest as a substantive right under the Alaska Civil rule 82 and A.S. 09.60.010 or otherwise under state or federal law; and

VII. For such further and other relief as the Court may deem just and equitable under the circumstances.

RESPECTFULLY SUBMITTED this 15 day of

REVISED 2ND AMENDED COMPLAINT

December, 1987.

---

Michael E. Plunkett, pro se  
600 Barrow Street, Suite 200  
Anchorage, Alaska, 99501  
(907) 276-4939, 277-5481

CERTIFICATE OF SERVICE

I, Michael E. Plunkett, hereby  
certify that on this day I  
caused to be served by hand  
delivery copy of the above to  
John Hedland at his address of  
record and L.S. Kurtz at his  
address of record.

Dated at Anchorage, Alaska  
this 15th day of December,  
1987.

---

Michael E. Plunkett, pro se

Michael E. Plunkett, Pro Se  
600 Barrow, Suite 200  
Anchorage, Alaska 99501

(907)276-4939

BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Michael E. Plunkett; Lane+Knorr+)	
Plunkett, Architects and Planners)	
Lane+Knorr+Plunkett Investment )	
Company, also known as LKP )	
Investment Company; Michael )	PROPOSED
Plunkett, Inc.; and all others )	FIRST
similary situated,	AMENDED
	AND/OR
Plaintiffs.	SUPPLEMENTAL
	COMPLAINT
v.	(COMPLAINT TO
	BE RESUBMITTED
First Interstate Bank of Alaska,	IN ITS ENTIRE-
formerly, Alaska Bank of	TY IF LEAVE TO
Commerce, First Interstate	AMEND IS
Bancorporation; First Interstate)	GRANTED)
Bank of Oregon, formerly First )	
National Bank of Oregon; Lawyers)	
Title Co., Inc.; Anchorage School)	
District; and unknown Defendants)	
Does 1 through 35,	JURY TRIAL
	DEMANDED
Defendants.	)

No. A84-387 Civil

NINTH CLAIM FOR RELIEF

44. That plaintiff, Michael E. Plunkett,  
incorporates by reference each and every  
staement fact, allegation and complaint

set forth in paragraphs 1 through 43 if the same had been set forth herein in full.

45. That although the jury's verdict<sup>-</sup> described in Paragraph 10 was vacated in favor of defendants as a result of the granting of a Motion notwithstanding the verdict, the plaintiffs in the above referenced Oregon cases have appealed, briefs have been filed and the appeal is yet to be set for oral argument. In the motion granting the judgment notwithstanding the verdict the opinion acknowledged that loans had been made below the prime rate. A copy of that opinion is included as Exhibit 4 hereto.

46. The loan agreement outlined in Paragraph 9, hereto contained the definition of the prime rate, Exhibit 2, Page 1, to Complaint as the rate charged to its most credit worthy borrowers. As loans were discounted below this rate,

said rate was fraudulently misrepresented by defendants First Interstate of Alaska, Inc. (formerly Alaska Bank of Commerce), and First Interstate Bank of Oregon (formerly First National Bank of Oregon).

47. As a result of the default and trustee sale held on September 12, 1984 (Exhibit 3 to original complaint) plaintiffs and therefore Michael E. Plunkett suffered an equity loss of about \$74,000. On information and belief, defendants, First Interstate of Alaska failed to notify tenant of real property described as Parcel 2, in Paragraph 13, of the complaint as required by AS 34.20.070 (c) (3) and further upon information and belief failed to notify persons, specifically the State of Alaska, Department of Labor, and the Internal Revenue Service of the notice of default as required by AS 34.20.070 (c)(4). Copies of said liens are attached as



Exhibit 5. Defendants further failed to mail a copy of the revised notice of default deleting parcel No. 3 from the original notice of default. A copy of this original notice which was mailed in violation of AS 34.20.070 (c) (1). is included as Exhibit 6.

48. As a direct and proximate cause of the interest overcharge and other unlawful activity described in the First through Eighth Claims for Relief of the illegal sale of the property described in Paragraph 13 as described in Paragraph 47 above, plaintiffs and therefore plaintiff, Michael E. Plunkett have suffered direct and compensable damages in the amount of the equity loss of approximately \$74,000 pluss general special, statutory and other damages as shall be determined at trial.

#### TENTH CLAIM FOR RELIEF

49. That plaintiff, Michael E. Plunkett,

incorporates by reference each and every allegation statement and fact, set forth in paragraphs 1 through 49 as if the same had been set forth herein in full.

50. As a direct and proximate result of the damages incurred by the interest overcharges, default and sale outlined in Paragraph 47, plaintiff, Michael E. Plunkett was forced to subdivide and sell property in Homer, Alaska which he had planned to hold and develop as townhouse condominiums in the future. Said property sales proceeds went to pay debts owed by Lane + Knorr + Plunkett Architects caused by LKP Investments having insufficient cash flow to operate as a result of the interest overcharge and default and sale. Lane + Knorr + Plunkett Architects was forced to utilize its cash to pay rent in lieu of receiving rent credits against the loans it had made to LKP Investments.

51. As a futher proximate result of said

cash position Michael Plunkett was unable to utilize lot sale proceeds to make two final payments on the Homer property thus causing a default and sale on that property. Said default was the direct and proximate result of the interest overcharge and default and illegal sale outlined in Paragraph 47.

52. As a proximate result of said default in Homer, Michael E. Plunkett suffered direct and compensable losses of approximately \$115,000 in equity and other compensatory, consequential general and other costs and damages in an exact amount to be proven at trial.

#### ELEVENTH CLAIM FOR RELIEF

53. That plaintiff, Michael E. Plunkett, incorporates by reference each and every allegation statement and fact, set forth in paragraphs 1 through 52 as if the same had been set forth herein in full.

54. That defendant Lawyer's Title

Company, Inc. is an Alaskan Corporation which has placed the below described real property on the market for a trustee's sale under a Deed of Trust Notice of Default and sale on behalf of the beneficiary, defendant, First Interstate Bank of Alaska pursuant to AS 34.20.070, 34.20.080, and 34.20.100.

55. As a direct and proximate result of the interest and overcharges and defaults outlined above, LKP Investments was unable to maintain sufficient cash flow to meet its mortgage payment obligations. As a result, a notice of default with trustee sale is scheduled for 15 October 1985 at 11:45 A.M. on the following real property parcels:

PARCEL I:

COMMERCIAL UNIT NO. 1, 600 BARROW a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on February 10, 1982 as Plat No. 82-20, as identified in the

Declaration recorded February 10, 1982, in book 697 at page 942, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH and undivided 3.718% interest in the common areas being Lot 1, Block 110, ORIGINAL TOWNSITE OF ANCHORAGE, records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH the exclusive right to use those certain limited common areas and facilities as set forth in said Declaration.

PARCEL II:

COMMERCIAL UNIT No. 2, 600 BARROW a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on February 10, 1982 as Plat No. 82-20, as identified in the Declaration recorded February 10, 1982, in book 697 at Page 942, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH and undivided 29.484% interest in the common areas being Lot 1, Block 110, ORIGINAL TOWNSITE OF ANCHORAGE records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH the exclusive right to use those certain limited common areas and facilities as set forth in said Declaration.

PARCEL III:

COMMERCIAL UNIT No. 3, 600 BARROW a condominium as shown on the floor plans filed in the office of the Anchorage Recorder for the Anchorage Recording District, Third Judicial District, State of Alaska, on February 10, 1982 as Plat No. , 82-20, as identified in the Declaration recorded February 10, 1982, in book 697 at Page 942, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH and undivided 25.117% interest in the common areas being Lot 1, Block 110, ORIGINAL TOWNSITE OF ANCHORAGE records of the Anchorage Recording District, Third Judicial District, State of Alaska.

TOGETHER WITH the exclusive right to use those certain limited common areas and facilities as set forth in said Declaration.

PARCEL IV:

Lot Three, Block One Hundred Eleven, ANCHORAGE TOWNSITE, records of the Anchorage Recording District, Third Judicial District, State of Alaska.  
parcels:

These parcels are the commercial office condominium units which were developed as a part of the interim loan agreement outlined in paragraph 9. A copy of the Deed of Trust securing these properties and a copy of Notice of Default are

included as Exhibit G and Exhibit E to Affidavit of Michael E. Plunkett in support of preliminary injunction and/or temporary restraining order.

56. Said Notice of Default and sale has violated AS 34.20.070 (c)(3) and (4) in that tenants and all lien holders have not been notified or as a direct and proximate cause of this illegal conduct and the aforementioned illegal conduct. Plaintiff stands to lose all his assets and equity arising from interest overcharge illegal foreclosure outlined in Paragraph 9, foreclosure of subsequent property in Homer, Alaska, and the instant foreclosure scheduled for October 15, 1985 at 11:45 A.M.

57. That Defendant, First Interstate Bank of Alaska, formerly, Alaska Bank of Commerce, by and through the trustee Defendant, Lawyer's Title Insurance Co., Inc., has declared and published its



intention to default and sell the above-described real property on 15 October, 1985 at a sale in Anchorage, Alaska; and that Plaintiffs stand to suffer irreparable harm and to lose unique and valuable interests in the real property unless the Court intervenes to provide relief, there being no adequate or complete remedy available at law. At the time of the notice of default under the notes and deeds of trust, Plaintiffs had allegedly been in arrears to the Defendant, First Interstate Bank of Alaska for a sum of about \$100,000.00 less than the unlawful overcharges and subsequent damages accruing to defendants as aforesaid.

58. That as a result of the illegal conduct on the part of the defendants, plaintiffs, Michael E. Plunkett had been forced to incur additional indebtednesses; and that additional direct and

consequential damages have been incurred thereby.

59. That upon information and belief, defendant Anchorage School District and all or some of the defendants, banks, have unlawfully colluded and/or conspired at various times to intentionally inflict economic hardships upon plaintiffs to hereby put him out of business by depriving plaintiff of additional loans which would have relieved to some extent the distress in which defendants had placed plaintiffs.

60. That plaintiff had not been aware, and could not reasonably have become aware, of the unlawful activities of the defendants, Anchorage School District, until review of the Treasurer's Report took place in mid 1984.

61. That as a direct and proximate result of the aforesaid acts and omissions on the part of the Defendants, and all of them,

plaintiff, Michael E. Plunkett, has suffered and will continue to suffer ongoing irreparable harm for which there is no complete and adequate remedy at law. In particular, plaintiff stands to lose valuable interests in the above-described real property; loss of reputation. disparagement of business reputation and relationships; have become involved in other foreseeable state litigation; and such other irreparable harm as shall be evidenced to the Court.

62. That as a direct and proximate result of the aforesaid acts and omissions on the part of the defendants, said defendants are jointly and severally liable to plaintiffs in an amount in excess of \$1 million (\$1,000,000.00) the exact amount of which is to be determined at trial. Said damages consist, without limitation, of (a) direct damages arising from usurious and/or overcharged sums for

interest. (b) direct and compensatory damages for breach of contract and fraudulent misrepresentation; (c) consequential damages for plaintiffs' foreseeable inability to meet their ongoing obligations as a result of the unlawful and unfair conduct on the Defendants part; (d) punitive and exemplary damages; (e) actual legal fees, expenses and any damages incurred in other lawsuits forced upon plaintiffs as a result of defendants' conduct; (f) general compensatory damages for tortious conduct; (g) damages for harm to individual and business reputation and disparagement; (h) special damages for costs incurred by plaintiffs to accountants, investigators, experts and other contractors; and (k) such other general, special, compensatory, statutory, consequential and other damages of any kind or type as shall be determined at trial.

63. That Defendants' conduct had been, and continues to be, so extreme, outrageous, willful and in bad faith that punitive and exemplary damages should be awarded in an amount to be determined at trial.

WHEREFORE, plaintiffs pray for judgement and for relief as follows:

I. For speedy permanent and temporary injunctive relief preventing the foreclosure sale of the above-described real properties; and

II. Alternatively, if the Court does not enjoin the foreclosure sale of said real properties, for damages (enhanced to the extent permitted by law) for Plaintiffs' losses of equity and other damages shown in addition to all other damages requested herein; and

III. For such other speedy permanent and temporary injunctive and declaratory relief as shall be necessary and advisable

to protect interest of the Plaintiffs from suffering existing, ongoing or future irreparable harm, and to fully set forth the rights of existing, ongoing or future irreparable harm, and to fully set forth the rights of the parties; and

IV. For the individual, Plaintiffs to be awarded against Defendants, jointly and severally as applicable, general, special, compensatory, statutory, consequential, punitive, treble, and other damages of any kind or type in an amount in excess of ONE MILLION DOLLARS (\$1,000,000.00) as shall be determined at trial; and

V. For interest to be awarded both before and after judgment; and

VI. For such further and other relief as the Court may deem just and equitable under the circumstances.

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RESPECTFULLY SUBMITTED this 11th day of October, 1985.

APPENDIX - 4

SUPPLEMENTAL ADDENDUM TO APPELLANT BRIEF  
AND REPLY BRIEF  
CITATION TO SUPPLEMENTAL AUTHORITIES TO  
APPELLANT BRIEF AND REPLY BRIEF  
ERRATA TO APPELLANT BRIEF  
ERRATA TO REPLY BRIEF

CONTENTS

- 1) CERTIFICATE OF SERVICE
- 2) SUPPLEMENTAL ADDENDUM TO APPELLANT  
BRIEF AND REPLY BRIEF

Pursuant to Rule allowing Statutes, Rules etc. to be submitted by separate pamphlet, the following Statutes and Rules are included as copied from the Alaska Statutes and Local Rules of the District Court for Alaska. Federal Rule Appellate Procedure 28(f).

GENERAL, ADMIRALTY, CRIMINAL, MAGISTRATE AND  
BANKRUPTCY RULES OF THE UNITED DISTRICT  
COURT FOR THE DISTRICT OF ALASKA

GENERAL RULES

RULE 5, MOTIONS AND OTHER MATTERS

- (A) Motions, etc., to be Served on  
Opposing Party.
- (B) Requirements for Submission.
- (C) Oral Argument.
- (D) Motions Submitted.
- (E) Discovery Motions.
- (F) Motions for Summary Judgment.
- (G) Motion for Shortened Time.

SUPPLEMENTAL ADDENDUM TO BRIEFS, ERRATA, ETC.



- (H) Frivolous and Unnecessary Motions;  
Penalty.
- (I) Interlocutory Applications; Evidence.
- (J) Motion for Rehearing or Recosideration

#### ALASKA STATUTES

Sec. 06.05.280. Bank fees and charges  
connected with mortgage loans

Sec. 11.31.100. Attempt.

Sec. 11.31.110. Solicitation.

Sec. 11.41.530. Coercion.

Sec. 11.41.520. Extortion.

Sec. 12.55.125. Sentences of imprisonment  
for felonies.

Sec. 45.45.010. Legal rate of interest

#### Article 3. Unfair Trade Practices and Consumer Protection

Sec. 45.50.471. Unlawful acts and  
practices.

Sec. 45.50.481. Exemptions.

Sec. 45.50.531. Private and class  
actions.

Sec. 45.50.542. Waiver.

Sec. 45.50.545. Interpretation.

Sec. 45.50.551. Penalties.

Sec. 45.50.561. Definitions

SUPPLEMENTAL ADDENDUM TO BRIEFS, ERRATA, ETC.

Article 4. Monopolies; Restraint of Trade.

Sec. 45.50.562. Combinations in restraint of trade unlawful.

Sec. 45.50.564. Monopolies and attempted monopolies unlawful

Sec. 45.50.566. Transactions and agreements not to use or deal in commodities or services unlawful.

Sec. 45.50.570. Interlocking directorates and relationships.

Sec. 45.50.572. Exemptions.

Sec. 45.50.574. Contracts voidable.

Sec. 45.50.576. Suits by persons injured.

Sec. 45.50.578. Certain violations constitute misdemeanor.

Sec. 45.50.580. Injunction by attorney general.

Sec. 45.50.582. Jurisdiction of court.

Sec. 45.50.584. Consent judgment.

Sec. 45.50.586. Judgment in favor of the state as evidence in action.

Sec. 45.50.588. Limitation of actions.

Sec. 45.50.590. Powers of attorney general.

Sec. 45.50.592. Documentary evidence.

Sec. 45.50.594. Testimony of witnesses.

Sec. 45.50.596. Definitions.

### 3) CITATIONS OF SUPPLEMENTAL AUTHORITIES TO APPELLANT BRIEF AND REPLY BRIEF

Pursuant to Federal Rule of Appellate Procedure 28 (j) the following additional authorities have been discovered and researched while preparing for oral argument. As oral argument was cancelled, the following citations are submitted. These citations are an attempt to clarify appellant Brief citations not fully cited, and/or to attempt to identify all opinions and cases by Federal and State Courts dealing with interest overcharges based on prime rates, particularly interest overcharges where the prime rate was floating and the prime rate was defined on the face of the note and the rate charged the institutions most credit worthy borrowers.

American National Bank and Trust Company of Chicago v. Haroco, Inc. et al., 473 US 606, 87 L Ed 2d 437, 105 S Ct 3291. Prime rate case before Supreme Court, included because held mail fraud sufficient crime to raise RICO claim. Appellant Brief (hereafter "AB" ) at 24-26, Reply Brief (hereafter "RB") at 6-9, 20-22.

Beaver Falls Thrift Corp. v. Commercial Credit Bus. Cite as 563 F. Supp. 68 (1983). Miscalculation of interest rates. AB at 32, RB at 3-9, 20-22.

Blacks' Law Dictionary, 5th Ed. p. 709 ("Inns of Court") St. Paul, West Publishing Co. 1979. Additional reference. AB at 17.

Catholic Lawyer, Vol 2. No.1, 1956.  
"Prayer for Lawyers" page 88. AB at 17,  
Included as additional reference. See also  
Vol. 1, no. 3, July 1955, "Votive Mass",  
pages 215-216.

Charing Cross, Inc. v. Riggs Nat'l Bank of  
D.C. No. 82-1116 (D.D.C. October 7, 1983).  
RICO prime rate case. AB at 24-26, RB at  
6-9,20-22.

Chemical Bank v. Geller 727 F.2d 61 (2d  
Cir. 1984). Prime rate misrepresentation,  
interest based on floating prime, prime  
defined as most credit worthy, RICO and  
common law fraud claims, AB at 24-26, 29,  
RB at 6-9,20-25.

Coastal Steel Corp. Chemical Bank, Civil  
No. 82-1714 (D.N.J., October 198\_)RICO  
prime rate case. AB at 24-26, RB at  
6-9,20-22..

Derenco, Inc. v. Benj. Franklin Fed. Sav.  
& Loan Ass'n., Or., 577 P.2d 477, Class  
action, interest charge. AB at 12, RB at  
25.

George v. United Kentucky Bank, Civ.No.  
C-82-0021 (W.D.Ky. June 10, 1982).RICO  
prime rate case. AB at 24-26, RB at  
6-9,20-22.)

Grant v. Union Bank, 629 F.Supp. 570  
(D.Utah 1986). Prime rate claims where  
prime rate not defined, RICO, fraud  
claims, AB at 24-26,29. RB at 6-9,20-22.

Haroco v. American National Bank & Trust  
Co., Cite as 577 Supp. 111 (1983)RICO  
prime rate case. AB at 24-26, RB at  
6-9,20-22.).

Haroco v. American National Bank & Trust Co. of Chicago, Cite as 747 F.2d 384 (1984), RICO prime rate case. AB at 24-26, RB at 6-9, 20-22..

Haroco v. American National Bank & Trust Co. of Chicago, Cite as 647 F.Supp. 1026 (N.D.Ill 1986) RICO prime rate case. AB at 24-26, RB at 6-9, 20-22..

Haroco v. American National Bank & Trust Co. of Chicago, Cite as 662 F.Supp. 590 (N.D.Ill. 1987) RICO prime rate case. AB at 24-26, RB at 6-9, 20-22..

Haroco v. American National Bank & Trust Co. of Chicago, Cite as 121 F.R.D. 664 (N.D.Ill 1988) RICO prime rate case. AB at 24-26, RB at 6-9, 20-22..

Kleiner v. First National Bank of Atlanta, 526 F.Supp. 1019 (N.D.Ga 1981). RICO, Breach of Contract, misrepresentation, usuary, void for vagueness of prime rate case where prime rate defined on face of note as rate charged most credit worthy borrowers. Initial case denied RICO claims. AB 1-50, RB 1-25.

Kleiner v. First National Bank of Atlanta, George Morosani v. First National Bank of Atlanta, 97 F.R.D. 683 (1983) Class action certified, Prime rate case where prime rate defined regarding most credit worthy borrowers, RICO claims, breach of contract claims, pendant claims maintained even though Federal claims initially dismisses.

Kleiner v. First National Bank of Atlanta, George Morosani v. First National Bank of Atlanta, 581 F.Supp 955 (1984). Motion for summary judgment on pendant claims denied. AB at 1-50, reply Brief at 1-25 .

Mars Steel v. Continental Illinois National Bank and Trust Company of Chicago. 834 F.2d 677 (7th Cir. 1987). RICO, Breach of contract, fraud on prime rate cases, defined prime rate. Approval of Settlement. AB 1-50, RB 1-26.

Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 (6th Cir. 1988). Held Antitrust and RICO, pendant claims should not be dismissed. Prime rate case with some defendants defining prime rate as most credit worthy borrowers. Id at 676, n. 2. Cites Living Webster Encyclopedia of the English Language (1971) and Americian Heritage Dictionary of the English Language (1981) prime rate definition as "minimum" and "lowest" rates of interest. AB 1-50, RB 1-26.

Mooney v. Fidelity Union Bank, Civ. Nos. 82-3192, 3193 (D.N.J. March 21, 1983). RICO prime rate case. AB at 24-26, RB at 6-9, 20-22..

Morosani v. First National Bank of Atlanta. 703 F.2d 1220 (11th Cir. 1983). Appeal overturns Kleiner case denial of RICO claims above. AB 1-50, RB 1-26.

Morosani v. First National Bank of Atlanta. 581 F.Supp. 945 (1984). Related to Kleiner above. AB 1-50, RB 1-26.

NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987). Appeal of loss at trial of claims for fraud, RICO, unfair trade practices, breach of contract. Prime rate undefined. Trial court affirmed. Appeal deemed frivolous. Appeal in forma pauperis denied. 484 U.S. 974, 98 L.Ed 2d. 481, 108



S.C.483, Dec. 7, 1987.

National Society of Professional Engineers v. U.S., 435 U.S. 679, 55 L.Ed 2d 637, 98 S.Ct. 1355, (1978). Appeal of NSPE v. U.S., 555 F.2d 978 (10th Cir. 1977). Anti trust case where Court held that ethical canon requiring members not to compete based on price in rule of reason violation of 15 U.S.C. et seq. Court ruled said canon was not price fixing per se but was still anticompetitive. Court also at District Court level ruled out recommended fee schedules as used by engineers and Architects (original defendant who signed consent decree) as also price fixing. Appellant planned to argue the NSPE cases as controlling (if not directly, by parity of reasoning) in their application to the "rate fixing" prime rate setting by FIBC, FIBO, and FIBA. AB 1-50, RB 1-26, including the "count of four" and other lock step or overt prime rate fixing agreements.

Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 558-562 (S.D.N.Y. 1985). Antitrust per se tying claim summary judgment of dismissal granted, RICO, Prime rate breach, interference claims, breach of contract, prime rate defined as charged to most credit worthy borrowers. Summary Judgment denied as to prime rate breach dismissal. AB 1-50, RB 1-26.

Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 214-217 (4th Cir. 1987), Federal case describing practice of "railroading" a decision, researched but misplaced for inclusion in Appellate Brief, page 45-46. Was to have been included in oral argument.



Shaw v. Oregon Bank, Civ. No. 82-126BE  
(Ore. May 17, 1982) .RICO prime rate case.  
AB at 24-26, RB at 6-9,20-22..)

Wilcox Development Company v. First  
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actions, initial denial of class action  
based on management reasons, preferring  
instead the test case and subsequent  
collateral estoppel. AB 1-50, RB 1-26.\_

Willcutts v. Jefferson Trust and Sav.  
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Burke, Civil RICO and Interest Rate  
Regulations, 39 Business Law Reporter,  
1252, 1259-61 (1984),RICO prime rate  
cases. AB at 24-26, RB at 6-9,20-22..

41 Washington Financial Reporter, Dec. 19,  
1983, at 933.RICO prime rate cases,  
settlement for large sums. AB at 24-26, RB  
at 6-9,20-22..

#### 4) ERRATA TO APPELLANT BRIEF

As a result of rush to reduce page length  
to 50 pages, some syntactical and  
typographical errors resulted. The most  
garbled phraseology is corrected herein.  
This was to be discussed at oral argument.

Page 44, Paragraph 2, Sentence 2 should  
read as follows:

"Plaintiff could not have effectively  
rebriefed the Opposition to summary  
Judgment by FIBC and FIBO. . . .  
(emphasis on added word.)

Page 44, Paragraph 2, sentence 4 should read as follows:

" As a result, Plaintiff was still not aware of the effects of Anderson, Celotex, Matsushida or California at the hearing and a prima facie case argument were therefore not made at all. . .

#### 5) ERRATA TO REPLY BRIEF

In the haste to sufficiently edit Reply brief, page 25-26 are garbled. Change Sentence beginning on line one of page 26 to read as follows.

" To accomplish same meant a period of discounting below the prime rate to maintain a nationwide artificially high prime rate while making the transition to an advertised prime rate which was merely an average rate, while before it was the lowest rate."

Dated at Manhattan Beach California  
this 10th day of May, 1990.

15  
Michael E. Plunkett, pro se.

12 USC 1441

(b) Resolution Trust Corporation established.

(10) Corporate Powers. The Corporation Shall have the following powers.

(F) To sue and be sued in its corporate capacity in any court of competent jurisdiction.

12 USC 1819 Incorporation powers seal

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal.

(b) Agency authority.

(2) Federal court jurisdiction.

(A) In general. Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal. Except as provided in subpaqragraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court.

27 (C) Appeal of remand. The Corporation may appeal any order of

remand entered by any United States district court.

(D) State actions. Except as provided in subparagraph (E), any action-

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff.

(ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution. and

(iii) in which only the interpretation of the law of such State is necessary, shall not be

deemed to arise under the laws of  
the United States.

(E) Rule of construction. Subparagraph  
(D) shall not be construed as limiting the  
right of the Corporation to invoke the  
jurisdiction of any United States district  
court in any action described in such  
subparagraph if the institution of which  
the Corporation has been appointed  
receiver could have invoked the  
jurisdiction of such court.

28 USC 518

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

(b) [Unchanged]

(As amended Oct. 10, 1980, P.L. 96-417, Title V, para. 503, 94 Stat. 1743, Apr. 2, 1982, P.L. 97-164, Title I, Part A, para. 117, 96 Stat. 32.)





Supreme Court, U.S.  
**F I L E D**  
DEC 21 1990  
JOSEPH E. SPANIOLO, JR.  
CLERK

NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND

PLANNERS; LANE + KNORR + PLUNKETT,

INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT

COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

RECEIVER OF FIRST INTERSTATE BANK OF

ALASKA; FIRST INTERSTATE BANCORPORATION;

FIRST INTERSTATE BANK OF OREGON,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

CONDITIONAL PETITION FOR REHEARING OF ORDER

DENYING PETITION FOR WRIT OF CERTIORARI

Michael E. Plunkett, Pro Se  
331 8th St  
Manhattan Beach, Cal. 90266  
(213) 379-9848

DECEMBER 21, 1990.

EDITOR'S NOTE:

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No. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

-----  
MICHAEL E. PLUNKETT, Petitioner

LANE + KNORR + PLUNKETT ARCHITECTS AND

PLANNERS: LANE + KNORR + PLUNKETT

INVESTMENT COMPANY, a/k/a LKP INVESTMENT  
COMPANY,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
As Receiver of First Interstate Bank of  
Alaska; FIRST INTERSTATE BANCORPORATION,  
FIRST INTERSTATE BANCORPORATION,

Respondents.

-----  
ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

-----  
CONDITIONAL PETITION FOR REHEARING



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## CONDITIONAL PETITION FOR REHEARING

Petitioner moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, and (2) granting the Petition for Writ of Certiorari. This Motion is conditioned on Court's denial in whole or in part of Petitioner's Motion to Vacate Order Denying Petition for Writ of Certiorari for Procedural Error ("MV").

### Reasons for Granting Rehearing

#### A. Intervening Circumstances of a Substantial or Controlling Effect.

##### 1. Court Made a Prejudicial Procedural Error in Distributing the Petition Before It Was Ripe, Thus Denying Petitioner a Meaningful Opportunity to File a Reply Brief

Court received Solicitor General Waiver November 6, 1990. (Supreme Court Record "SCR" 3). Court erroneously distributed Petition Nov. 7, 1990. SCR 4, prior to the time for filing Opposition brief by Respondents. SCR 4. Court denied Petition Nov. 26, 1990. SCR 6. Said

premature distribution is in violation of Rule 15.5. Such egregious error denied Petitioner procedural due process of law in that time to submit a meaningful Reply Brief to Opposition Brief of FIBO and FIBC of November 15, 1990 was denied. Said error was prejudicial in that the Reply Brief was necessary to point out,

" . . . misstatements of fact or law set forth in the (Opposition) which have a bearing on the question of what issues would properly be before the court if certiorari were granted. Rule 15.1

Those misstatements are detailed in MV. FIBC/FIBO principal errors were (1) stating only evidence before the court were affidavits included in Opposition Brief Appendices when verified complaint, proposed amended complaint and affidavits included in Appendix to Petition("AP") were also before the District Court who ignored same in ruling

" FIBO and Interstate of Alaska had no relationship whatsoever at the time the loans were made." FIBO Opposition, App.

B-4. (A statement parroted from FIBO/FIBC)

(2) Errored in stating

"petitioner failed to sustain his burden showing any nexus whatever between FIBC and FIBO and the loans made to petitioner by the Alaska Bank."

FIBO Op. Brief ("OB") at 20.  
Petitioner had submitted evidence of participation loan program between FIBO and Alaska Bank of Commerce ("ABC") later First Interstate Bank of Alaska ("FIBA") now FDIC as receiver. OB App. J-3.

(3) Errored in stating

"the evidence at summary judgment showed that the Alaska bank unilaterally referenced the Oregon bank's prime rate, for purposes of convenience. . . "

OB at 21, when Homan Affidavit , OB App. J-3, described the pegging as being part of the loan participation program.

(4) Errored in stating,

Because all of petitioner's remaining federal and state claims relied upon showing of connection between FIBC or FIBO and the loans made to petitioner,"

OB at 21, when in fact verified Complaint (App.1 to MV) and Revised Second



Amended Complaint ("RSAC"), (App.2 to MV) made claims for FIBO misrepresentation of interest rate in telephone calls, RICO claims, Alaska Consumer Protection statute, AS 45.50.471 et sec. based on independant torts and wrongs of FIBO/FIBC.

(5) errored in interpreteting United Mineworkers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) was authority to dismiss pendant and ancillary claims with prejudice when they had not been tried, and (6) that Arizona v. Cook Paint and Varnish Co., 541 F.2d 226, 227-28 (9th Cir. 1976), per curium, cert den. 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed. 2d 593 (1977), a claim which upheld dismissal with prejudice of pendant claims decided at trial before dismissal of federal claims was applicable to dismissal of pendant and ancillary claims against FIBO and FIBC and impliedly FDIC.OB at 22.

Lack of reply brief also prejudiced

pro se Petitioner ability to counter  
Opposition Brief's reliance on false  
conclusion of Appellate Court that

" Since all of his (Petitioner's)  
claims, both state and federal, are based  
on an allegation of conspiracy, the  
district court rendered summary judgment  
against all of them."

Neither the attorney drafted  
Complaint nor the RSAC based said claims  
on said conspiracy allegation. Even if the  
RSAC could be so construed, pro se  
pleadings are held to less stringent  
standard, Haines v. Kerner, 404 U.S.  
519, 520-21, 30 L.Ed.2d 652, 92 S.Ct. 594  
(1972), and Petitioner is entitled to  
amend to correct deficiency. Noll v.  
Carlson, 809 F.2d 1446-1449 (C.A.9, 1987).

2. Any Justice with Interests in, or  
Obligations to First Interstate Bancorp or  
Affiliates Failed to Recuse Themselves

In reviewing U.S. Supreme Court  
Bulletin Petitioner found biographies of  
Justices Id. at 14-15 wherein Justice  
O'Conner is listed as a board member of

First National Bank of Arizona, 1971-1974, and director of Lazy B Cattle Co., 1958 to date. These directorships are not included in American Bench, 1987/1988 page 59. On May 14, 1975 Southern Arizona Bank & Trust Co., subsidiary of Western Bancorporation, now Respondent First Interstate Bancorp, merged into First National Bank of Arizona through an exchange of stock. Moody's Bank and Financial Manual, 1990, page 1606. In May 1981, First National Bank of Arizona was consolidated into Western Bancorporation with stockholders receiving latter's stock. Id. Dun's Million Dollar Directory, 1988, p. 2963 lists Lazy B Cattle Company without bank reference, no directors other than its president and director Donald Mason.

A Justice must avoid even the appearance of impropriety. Code of Judicial Conduct, Justices with an ownership in a company before the court,

and by parity of reasoning, indebted to a party before the court, must recuse themselves, 28 USC 455, in any proceeding in which their impartiality might reasonably be questioned. Further, as Justice for the 9th Circuit, Justice O'Conner has made two trips to Anchorage, Alaska, one reported at 9th Circuit Judicial Conference 132 FRD 83,85, 95, (1990), the other in 1988, in which Justice O'Conner made a speech introduced by Judge Karen Hunt of the Anchorage Superior Court, judge in related case 3An-83-4318 Civil. Matters concerning case may have been disclosed, mandating disqualification per 28 USC 455 (b)(1).

Justice O'Conner is the Justice for the 9th Circuit, and as "cert pools" have existed, See Woodard, Armstrong., The Brethren, Avon, 1981, page 322-323, and as the synopsis of issues presented for review in United States Law Week.

11/20/90, 59 LW 3375, parroted Respondent's Issues, it follows any "cert pool" summary was prejudicial to Petitioner, to the extent violation of 28 Should any Justice be disqualified, Rehearing is mandated on due process grounds.

3. 28 USC 1441(c) Has Been Changed in Such a Manner As Denial of Petition Is Prejudicial and Manifestly Unjust App. 12

Judicial Improvements Act of 1990, P.L. 101-650 amended 28 U.S.C. 1441(c), Congressional Record, October 27, 1990, S-17904, 17912. The purpose of the Act, 17 Federal Rules Service Current Material Highlights 3rd, Release 3, pages 8-9, November, 1990, is to alleviate problems of cost and delay in civil litigation.. The 28 USC 1441(c) amendment, App. 12, intends to allow Federal Courts to remand - all matters in which state law predominates, thus making a stronger case than United Mine Workers v. Gibbs, that

upon dismissal of federal issues, state issues should be dismissed for refileing in state court. With this Congressional change since Petition was filed, it would be manifestly unjust to deny Petitioner's Petition for Rehearing based on Petitioner's failure to formally file an Opposition to FDIC Motion. Pendant claims against FDIC and FIBO were, given the statutory change, improperly granted summary judgment on the fallacious grounds that all such claims hinged on the allegation of conspiracy, a false analysis.

4. Federal Rule of Civil Procedure 56 Is Being Revised, and Has Been Forwarded to Standing Committee since Petition Was Denied.

The Advisory Committee on the Federal Rule of Civil Procedure has proposed a new Rule 56 which incorporates the de facto standard changes of Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986), Celotex

Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 S.L.Ed.2d 265 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). It would be unjust to deny Pro se Petitioner opportunity to amend summary judgment evidentiary materials to meet the revised standard solely because he fell within the window of time subsequent to the decisions changing the rule and the promulgation of the rule revision. Said change is a method of informing non-prisoner pro se litigants of the evidentiary standard they must meet to resist summary judgment. Jacobsen v. Filler, 790 F.2d 1362, 64-66 (C.A.9 1986). March 1989 Advisory Committee Amendment to Rule 84 even proposed adding Practice Manual. App. 13.

It is undisputed the three 1986 cases

"taken together effected major changes in summary judgment doctrine and practice".



Jeffrey W. Stempel, A Distorted Mirror. The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process , 49 Ohio State Law. Journal, 96,99 (1988).

" In essence the Court amended rule 56 to replace the words 'genuine issue of material fact' with words akin to ' facts presented by the nonmovant of sufficient weight to convince the trial judge that he or she would not grant a directed verdict for the movant at trial." Id. at 181.

The Advisory Committee Amendments to Federal Rules of Civil Procedure, 27, ( July 1987) demonstrated this profound change effected by the cases in its proposed Rules 56 and 40, App. 8 hereto.

Advisory Committee published an even more drastic Rule Change, App. 9, September 1989 with hearings held in February 1990. In November, subsequent to Filing Petition for Writ, a Rule 56, Rule 16(d) change was approved by Advisory Committee for forwarding to Standing Committee. App. 14 hereto. Said Draft

limits summary judgment based on law or facts not of substantial controversy, requires as a condition precedent non-moving party reasonable opportunity to discover relevant evidence not under their control, lists extremely specific requirements for movant and nonmovant, requiring citations to particular pages, attachment of documentary and other evidence to briefs, defines condition where an asserted fact is without controversy, mandates the court is not obligated to consider evidentiary materials not called to its attention, allows opponent to motion opportunity to make offer of proof where it is shown materials cannot be had, prescribes penalties for materials presented in violation of Rule 11. Ap. \_\_\_\_

As to FDIC summary judgment, new Rule does not require a response. Advisory Committee Notes, 11/90, page 56-8, however specific peril is outlined for failure to

- do so. Notes also describe methods by which documentary evidence may be submitted. Rule 56 will be forwarded to Standing Committee. (Conversation with Ann Gardiner, 12/17/90, Office of U.S. Courts Administration). Advisory Committee Reporter Paul Carrington (49 O.St. L.J. at 183, n. 423) stated Rule 56 "standards" of Anderson, Celotex, and Matsushita, are not changed. (Conversation 12/17/90).

Thus it is inequitable and manifestly unjust to hold a non-prisoner pro se litigant to an evidentiary standard effectuated by Court decisions, not reflected in subsequent rule change until after Petition for Writ is denied.

6. Documentation of Essential Elements of Pendant Claim for Misrepresentation Have Changed Since Petition was Researched.

Petitioner reviewed Alaska Pattern Jury Instructions at Los Angeles County Law Library. Article XVII had been replaced sometime after receipt September

19,1990, yet the promulgation letter was dated July 1988, and revision to the instructions was "revised 1987". App. 10 hereto. It is unjust to hold petitioner to a more stringent burden of proof, in light of the revised elements outlined. Petitioner had no reason to question the old elements as neither FIBO nor FDIC questioned said elements.

As a result of this changed evidentiary standard, and more importantly lack of reasonable access to same by pro se litigant, petitioner has been denied substantive due process,. Certiorari must be granted to allow Petitioner to demonstrate facts exist to prove essential elements of new misrepresentation standards. New pattern Jury Instructions are included in App. 11.

7. New Evidence Demonstrates the Increased Magnitude of the Interest Rate Overcharge and Interest Rate Misrepresentation by FIBC and its Subsidiaries

The magnitude of the injuries to the Petitioner is enormous, exceeding \$50 million including compensatory, consequential, punitive, triple damages, special damages, and pre judgment interest. To the class, the injury is astronomical. Only on review of the Responent's list of parties did Petitioner know for the first time the enormous array of First Interstate second tier subsidiaries. Moody's Bank and Financial Manual, 1990, page 1606 et seq. only lists first tier subsidiaries. Prime rate misrepresentation cases against FIBC and/or its subsidiaries is enormous, as are number of prime rate fixing RICO cases. See Burke, Civil RICO and Interest Rate Regulations, 39 Bus. Law Rptr., 1252, (1984), and 41 Washington Financial Rptr., 12/19/83 at 933. See Mars Steel v. Continental Illinois National Bank and Trust Company of Chicago, 834 F.2d 677

(7th Cir. 1987)).( Continental Illinois' London based subsidiary was purchased by FIBC in July 1984) .

B. Other Substantial Grounds not Previously Presented

The statements of fact and law by the District and Appellate Courts have resulted in the summary judgment against Petitioner. Granting of summary judgment in favor of FIBC and FIBO was based on the false facts that Petitioner had failed to prove any relationship whatever between FIBO and ABC at the time the loans were made. OB App. B-4, and that all allegations against FIBO and FIBC were predicated on the existence of a conspiracy. OB, App. B-7. As to FDIC, summary judgment was "railroaded" contrary to Celotex, 477 U.S. at 326, 91 L.Ed.2d at 276, (see also Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 214-217 (4th Cir. 1987) the Court granting summary

judgment for failure to formally submit a one sentence "Opposition to Motion" despite the record containing at that point two verified complaints and numerous Affidavits from Petitioner all proving various claims against FDIC.

At the Appellate level the manifest injustice was continued in Appellate court's false application of the abuse of discretion standard to review of granting of summary judgment as to pendant and ancillary claims against FIBC, FIBO and FDIC in lieu of de novo review, and the perpetuation of the erroneous finding that " Since all of his claims, both state and federal, are based on an allegation of conspiracy."

Court erred in holding Development Co. v. First Interstate Bank of Oregon, 815 F.2d 522 as to the antitrust action, when the factual scenario is different. Wilcox cases did not involve loan documents with



the misrepresented definition of the prime rate on the face of the note emanating from a participation agreement between FIBO and another bank. The Appellate Court should have cited Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 676,n.2, (6th Cir. 1988) which was based on Dictionary definitions of prime rate as a term of art meaning "minimum and "lowest", and was factually more akin to the instant case since the prime rate was defined on the face of the note. Id. . Similarly, since Petitioner provided proof a meeting of the minds existed to fix the rate of interest charged on participation loans, said prime rate being a falsely defined rate, the effect was to fix interest rate at noncompetitive levels, to surpress price competition, and to deny - 7- Petitioner opportunity to obtain loans in a competitive market, thus forcing Petitioner to pay higher interest than

under natural conditions of competition. Petitioner therefore offered sufficient proof to raise a genuine issue of fact for trial based on the elements cited in the Michaels case, 848 F.2d 674,681 (6th Cir. 1988)..This case was cited in Supplemental Authorities, 5/10/90, MV App. 3. See Affidavits of Plunkett, Homan, Verified Complaints. At As to RICO, Appellate court relied on no authority whatsoever, rather than the several cases cited in MV App.3,) Appellant's Supplemental Authorities, and in Burke's Civil RICO and Interest Rate Regulations, 39 Business Law Reporter, 1252, 1259-61 (1984). Said clearly erroneous statements of fact and law in Appellate Memorandum Decision amount to substantive denial of due process, particularly when the Appellate Court did not even address many of petitioner's argued Points on Appeal , even in a footnote, such as denial of

motion to amend, etc.

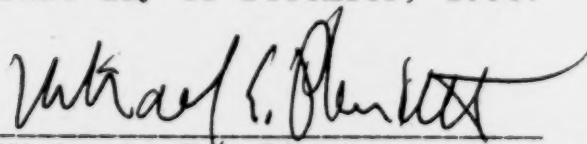
Where the proof is largely in the hands of the anti-trust conspirators, Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7L.Ed.2d 458 (1962) dismissals prior to ample opportunity for discovery should be sparingly granted. Hospital Building Company v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S.Ct. 1848, 1853, 48 L.Ed. 2d 338 (1976). methods used by FIBC, FIBO, and FIBA in their loan participation program and "count of four" methods are no different than the Rule of Reason standard applied in price fixing of National Society of Professional Engineers v. U.S., 435 U.S. 679, 55 L.Ed. 2d 637, 98 S.Ct. 1355 (1978). An understanding knowingly made, between competitors to follow any pricing formula which will result in raising or maintaining prices charged constitutes price fixing in

violation of 15 U.S. C. 1 et seq. See Del Rio Distributing, Inc. v. Adolph Coors Co., 589 F.2d 176 (5<sup>th</sup> Cir. 1979), rehearing den. 444 U.S. 840, 100 S.Ct. 80, 62 L.Ed. 2d 52 (1979).

### Conclusion

For any one of the above reasons, or more importantly, as a result of all the above items taken together, petition for Rehearing must be granted, Order denying certiorari must be vacated and certiorari granted.

Dated at Manhattan Beach, California this 21st day of December, 1990.



Michael E. Plunkett, Pro se, Petitioner, on his own behalf and on behalf of his partnership interests in Lane + Knorr + Plunkett Architects and Planners and Lane + Knorr + Plunkett Investment Company. 331 8th Street, Manhattan Beach, Calif. 90266. (213) 379-9848

### Certification

I hereby certify that this petition for rehearing is presented in good faith and

not for delay and is restricted to the  
grounds specified Rule 44.1 and 44.2.

Michael E. Plunkett

Michael E. Plunkett, Petitioner

## APPENDICES.

56(a). On motion the court shall render judgment with respect to any claim, counterclaim, or cross claim, if it finds that the moving party is entitled to judgment as a matter of law on established facts. In rendering judgment, the court shall establish the law and the material facts in conformity with Rule 40. Id at 66-69.

40(b) . . . the court may . . . establish facts on which the final decision on a claim, counterclaim or defense may depend. A fact may be established by the court only if there is no evidentiary basis on which the fact might be rejected by a reasonable trier of fact. Id at 38-39.

PRELIMINARY DRAFT OF PROPOSED  
AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE  
AND THE  
FEDERAL RULES OF CIVIL PROCEDURE

NOTICE

Public hearings on proposed amendments  
to the Civil Rules will be held on  
January 8, 1990 in San Francisco,  
California and on February 2,  
1990, in Chicago, Illinois

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COMMITTEE ON RULES OF PRACTICE  
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE  
UNITED STATES.

SEPTEMBER 1989



RULE 16. PRETRIAL CONFERENCES;  
SCHEDULING; MANAGEMENT

(In Part)

In addition, in order to avoid unnecessary costs of trial, the court may consider whether on its own initiative with adequate notice

(14) facts or law should be summarily established pursuant to Rule 56(a) to define the issues remaining for trial; or

(15) summary judgment should be entered pursuant to Rule 56 (b) with respect to any pending claim, counterclaim, or cross claim.

RULE 56. SUMMARY ESTABLISHMENT OF  
FACT AND LAW; SUMMARY JUDGMENT

Summary Establishment of Fact or Law.

(1) When the court on motion or at a pretrial conference conducted under Rule 16(d) determines that expedition and economy may be thereby achieved, it may

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pursuant to this subdivision summarily establish as a matter of law any facts that are not genuinely controverted or it may establish law to control further proceedings in an action. In establishing facts, the court need consider only those material satisfying the requirements of subdivision (c) of this rule that are brought to the court's attention by the parties.

(2) A motion to establish fact shall be accompanied by a memorandum containing (A) authority for the law controlling the action; (B) copies of any materials satisfying the requirements of subdivision (c) that reveal evidence that will be available for trial to prove the fact to be established and that cannot be genuinely contested; and (C) reference to any absence of probative evidence enabling an opposing party to satisfy a burden of

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producing evidence or proof. A motion to establish law shall be accompanied by a memorandum containing the authority for the law controlling the action.

(3) A party opposed to the summary establishment of the specified facts or law shall be allowed a reasonable time (30 days unless the court otherwise orders) to prepare an opposing memorandum which shall also be supported by reference to any relevant material available to the opponent that meets the requirements of subdivision (c)

(4) A fact may be summarily established only if any party opposing the order has had opportunity for discovery as provided in subdivision (d) of this rule but has not indicated in the opposing memorandum an evidentiary basis on which a reasonable trier of fact could find for the opposing party with respect to that

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fact. When a motion for a summary establishment of fact is made and supported as provided in paragraph (a)(2) of this rule, an opposing party may not rest upon the mere allegations or denials of the opposing party's pleading, but the opposing party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

(5) An order of establishment shall be entered reciting the fact or law established and the basis therefor.

Summary Judgment; Motion.

(1) If upon the basis of facts stipulated or summarily established or establishable as a matter of law, the court determines that there is no material fact genuinely in dispute and that a party is therefore entitled to judgement as a matter of law, the court may upon motion or at a pretrial

conference enter judgment for that party with respect to a claim, counterclaim, cross-claim, or third party claim.

(2)(A) A motion for summary judgment shall specify the judgment sought, and the law and the established or establishable facts on which the moving party is entitled to judgment.

(B) A party opposing a motion for summary judgment shall be allowed 30 days in which to file and serve a memorandum accompanied by any supporting material, and specifying those issues on which such a party intends to present evidence at trial if held. The opposing party may also make a cross-motion. If the opposing party makes such a response, the moving party shall be allowed 10 days for reply before any ruling on the motion or cross-motion is made. For good cause stated, the court may with notice shorten

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or extend the times for response and reply.

Materials Used to Support or Oppose  
Summary Establishment of Fact.

(1) To support or oppose a motion for summary establishment of fact, a party may, subject to the provisions of this subdivision, rely upon a pleading or other admission of the fact by the opposing party or affidavits, depositions, answers to interrogatories, documents, or items of physical evidence that are admissible to prove or disprove the fact to be established or that confirm the availability of such evidence. Where only a portion of any such material is relevant to the fact to be established, only that portion shall accompany the motion or memorandum in support of or opposition to the motion.

(2) An affidavit or declaration under  
APPENDIX 9

penalty perjury signed in the form authorized by 28 U.S.C. paragraph 1746 may be considered in ruling on a summary establishment of fact only if it is made on personal knowledge, sets forth such facts as would be admissible in evidence, and shows affirmatively that the affiant is competent to testify to the matters stated therein.

(3) If facts referred to in an affidavit or declaration are contained in another document, a copy of the document or the relevant excerpt shall be attached and the affidavit or declaration shall contain a specific reference to the document and the location therein where the excerpt can be found. Voluminous documents need not be attached to the affidavit or declaration and may be presented in the form of a verified chart, summary or calculation, provided that such

APPENDIX 9



documents are available for review by the parties and the court.

Opportunity for ~~Discovery~~. No Summary judgment shall be rendered with respect to any claim, counterclaim, cross-claim, or third party claim, nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established.

(g-e) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable

attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

With respect to a motion to establish facts, the requirements that the moving party specify the evidentiary basis on which the fact could be established is a more stringent requirement than is expressed in the former subdivisions. (a) and (b). Cf. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986).

Alaska Court System

State of Alaska  
Office of Administrative Director

303 K Street  
Anchorage, Alaska 99501

July 1, 1988

William T. Cotton  
Court Rules Attorney

L.A. County  
Sep. 19, 1990  
LAW LIBRARY

Instructions for Updating the Alaska Civil  
Pattern Jury Instructions

Revisions to several articles of the Alaska Civil Pattern Jury Instructions are attached. These revisions were completed by the Civil Pattern Jury Instruction Committees. The remainder of the articles will be reviewed, and revised instructions issued, in the next several years.

Instructions for supplementing the prior volume of jury instructions follow:

1. Articles 3 (Negligence); 5 (Motor Vehicle and Highway Safety); 6 (Owners and Occupiers of Land); 7 (Products
- APPENDIX 10

Liability); 8 (Professional Malpractice); 12 (Assult and Battery); 15 (False Imprisonment and False Arrest); 17 (Misrepresentation, Fraud and Non-disclosure).

Throw away all existing instructions for these articles and replace with the attached instructions for these articles and replace with the attached instructions. Do not discard other articles.

## 2. Article 20 (Damages).

Do not throw away all existing instructions. Discard only existing instructions 20.05, 20.07, 20.08, and 20.20. Then add the attached revised instructions in the appropriate places. (Note: The damages instructions review has not been completed. Revised instructions are solely aimed at making changes made necessary by "tort reform" legislation.);

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## 17.01 MISREPRESENTATION

Plaintiff claims that (he/she) was damaged because defendant misrepresented certain information. In Order to win on this claim, the plaintiff must establish it is more likely true than not true that:

1. The defendant made a false or misleading representation, either orally, in writing or by conduct; and

2. The defendant's false or misleading statement was susceptible of knowledge at the time made; and

3. The defendant's false or misleading statement was material. A material statement is one that could be reasonably expected to influence a person's judgment or conduct concerning the transaction in question; and

4. The plaintiff actually relied on the defendant's false or misleading statement; and

APPENDIX 11

5. The plaintiff's reliance on the false or misleading statement was justifiable. A buyer's reliance on a seller's material representation is justifiable, even if imprudent, or exhibiting poor judgment, unless the buyer's conduct is wholly irrational, preposterous, or in bad faith; and

6. That as a result of (his/her) reliance, plaintiff has suffered some damage or injury; and

7. That when the defendant made the false or misleading statements, (he/she) either was aware that the statement was false or misleading or a reasonably careful person under similar circumstances would have been aware that the statement was false or misleading.

If you decide that it is more likely true than not true that each of these things appened, then your verdict must be

APPENDIX 11

for the plaintiff. Otherwise, as to this claim, you must find for the defendant.

#### Use Note

Bevins imposed liability for innocent misrepresentation upon real estate agents and brokers for specific policy reasons. Cousineau and Foster allow recovery for innocent misrepresentation in the real estate case. Beyond these arguments may be raised concerning the lack of public policy or the lack of precedence. Paragraph 7 should be included only if innocent misrepresentation is not a claim by plaintiff in the case.

If the case involves nondisclosure, then 17.02 must be given.

#### 17.02 NONDISCLOSURE

Plaintiff claims that (he/she) was damaged because defendant failed to disclose certain information. In order to win on this claim, the plaintiff must establish that it is more likely true than not true that:

1. The defendant failed to disclose information to plaintiff; and

2. The defendant had a duty to disclose the information to the plaintiff.

APPENDIX 11



I will explain when defendant has such a duty to disclose in a moment; and

3. The information not disclosed was susceptible of knowledge at the time the transaction was made; and

4. The information not disclosed was material. Material information is information which, if disclosed, would be reasonably expected to influence a person's judgment or conduct concerning the transaction in question; and

5. The plaintiff actually formed and relied upon a false or misleading understanding created by defendant's non-disclosure; and

6. The plaintiff's reliance on (his/her) false or misleading understanding was justifiable. A plaintiff's reliance on a false or misleading understanding created by a

seller's nondisclosure is justifiable even if imprudent or exhibiting poor judgment for a person or plaintiff's background and experience unless the plaintiff's conduct in failing to discover the nondisclosure was wholly irrational, preposterous or in bad faith; and

7. As a result of (his/her) reliance, plaintiff has suffered some damage or injury ; and

8. That when the defendant failed to disclose the information (his/her) either was aware of the information not disclosed or a reasonably careful person under similar circumstance would have been aware of the information not disclosed.]

#### Use Note

Refer to the first paragraph in the use note to instruction 17.01 as to whether paragraph 8 of this instruction should be given.

Instruction 17.03 must be given immediately following this instruction.

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## 17:03 DUTY TO DISCLOSE INFORMATION

Defendant had a duty to disclose information to the plaintiff if you find that it is more likely true than not true that:

1. The defendant failed to disclose information which made the defendants statements misleading; or

2. The defendant had previously innocently made a false or misleading statement which was not susceptible to knowledge at the time made, but which the defendant later discovered or reasonably should have discovered was false or misleading; or

3. There existed between plaintiff and defendant.

a. a contractual relationship obligating the defendant to disclose information as part of the obligation to deal in good faith; or

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b. a relationship that imposed on defendant as a professional person, a duty to disclose information accurately because the defendant was in the business of providing such information; or

c. such other relationship whereby plaintiff had placed trust and confidence in defendant.

d. a relationship of (insert applicable fiduciary relationship).

#### Use Note

This instruction should follow 17.02. The language in paragraph 3 of this instruction should be changed to fit the particular circumstances of each case.

The Alaska Supreme Court has held that some relationships are fiduciary and hence involve a duty to disclose information.

Real estate agent and broker.

Veach v. Myers Real Estate, Inc.,  
599 P. 2d 746 and  
Black v. Dahl, 625 P. 2d 876

Attorney.

Greater Area, Inv. v. Bookman 657  
P.2d 828 and

Miller v. Sears, 636 P.2d 1183

Bookkeeper.

Paslay v. Barber, 368 P.2d 549

Corporate Shareholder.

Knabel v. Heiner, 645 P.2d 20a1, 663  
P.2d 55a and 673 P.2d 805

Financial Consultant.

Orsini v. Bratten, 713 P.2d 791  
(1986)

28 USC

Para. 1441. Actions removable generally

(c) Whenever a separate and independent claim or cause of action, ...1990 within jurisdiction confirmed by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in with state law predominantly.

(June 25, 1948, ch 646, para. 1, 62 Stat. 937; Oct. 21, 1976, P.L 94-583, para. 6, 90 Stat. 2898; June 19, 1986, P.L. 99-336 para. 3(a), 100 Stat. 637, P.L. 101-650; Oct. 27, 1990.

COMMITTEE ON RULES OF PRACTICE  
AND PROCEDURE.

OF THE

JUDICIAL CONFERENCE OF THE  
UNITED STATES,

PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO  
RULE 84 OF THE  
FEDERAL RULES OF CIVIL PROCEDURE\*

Rule 84. Practice Manual

The Practice Manual consist of administrative rules and forms and is set forth as an Appendix to these rules. The forms and rules contained in the Practice Manual are sufficient under these rules and any local district court rules and are intended to indicate the simplicity and brevity of statement that these rules contemplate. The Practice Manual may be amended from time to time by the Judicial Conference of the United States on recommendation of the Committee on Rules of Practice and Procedure arrived at after notice and comment.

APPENDIX 13



Rule 56. Summary Judgment

(b) Facts Not In Substantial Controversy. A fact is not in substantial controversy if it is stipulated or admitted by the parties who may be adversely affected thereby or if, considering the relevant admissible evidence shown to be available for presentation at a trial (or the lack thereof) and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to judgment as a matter of law with respect thereto under Rule 50.

(c) Motion and Proceedings Thereon. A party may move for summary judgment at any time provided the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their

APPENDIX 14

control. Within 28 days thereafter any other party may serve and file a response thereto, except that such response shall be filed within 14 days if the party has stipulated or admitted the facts asserted to be without substantial controversy.

(1) Without argument, the motion shall (A) describe the claims or issues as to which summary judgment should be granted, specifying the judgment sought; (B) briefly state the principles of law relied upon; and (C) recite in separately numbered paragraphs the specific facts asserted to be without substantial controversy and on the basis of which summary judgment should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

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(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary judgment should be granted, specifying with respect thereto the judgment that should be entered; (B) briefly state the principles of law relied upon; (C) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in substantial controversy, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting the contention; and (D) recite in separately numbered paragraphs any additional facts (whether or not asserted to be without substantial controversy) which preclude summary judgment, citing the materials evidencing such facts. To the extent a party fails to timely

APPENDIX 14

indicate and demonstrate under clause (C) that an asserted fact is false or in substantial controversy, it shall be deemed to have admitted such fact.

(3) If a motion for summary judgment or response thereto is based to any extent on depositions, answers to interrogatories, documentary evidence, or affidavits that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary judgment supplement its supporting materials.

(4) Argument supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion for summary judgment or response

APPENDIX 14

thereto and at such other times as the court may permit.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court may make an order specifying facts that are without substantial controversy or the controlling law, including the extent to which liability or the amount of damages or other relief is not an issue for trial, and directing such further proceedings in the action as are just. Upon the trial of the action the facts and law so specified shall be deemed established, and the trial shall be conducted accordingly. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).

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(e) Matters to be Considered. In determining whether an asserted fact is without substantial controversy, the court shall consider stipulations, admissions, and to the extent on file, the following:

(1) depositions, answers to interrogatories, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial, provided however that an affidavit must affirmatively show that the affiant would be competent to testify to the matters stated therein; and (2) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings only to the extent

of allegations therein that are admitted by other parties. Notwithstanding the foregoing, the court shall not be required to consider evidentiary materials not called to its attention pursuant to paragraphs (1) or (2) of subdivision (c).

(f) When Evidence Unavailable. Should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot for good cause shown present materials needed to support that opposition, the court may deny the motion, may permit an offer of proof, may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Powers of Court.

(1) The court (A) may specify the period during which motions for summary judgment may be filed with respect to

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particular claims or issues; (B) may enlarge or shorten the time for responding to motions for summary judgment, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials; (C) may on its own initiative direct the parties to show cause within a reasonable period why specified facts should not be treated as without substantial controversy and summary judgment based thereon granted; and (D) may conduct a hearing to consider further arguments, rule on the admissibility of evidence or receive oral testimony to clarify whether an asserted fact is in substantial controversy.

(2) Should it appear to the satisfaction of the court at any time that any motion, response, memorandum or supporting materials presented pursuant to this rule are presented in violation of

APPENDIX 14

Rule 11. the court shall forthwith order the party presenting such materials to pay to the other parties the amount of the reasonable expenses which the filing of the materials caused the other parties to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

